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IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1976

No. 76-1388

RAYMOND N. LOWE, CORRINE R. HILL, W.A. BROOKSBY, ABE BROOKS, G. DOUGLAS STRATTON, ALFRED BLOOM, JAMES WITZIG, CLAIRE L. NEWPORT, DIRK P. TEN BRINKE, and E. JEAN WARE, Petitioners

v.

EUGENE SAND & GRAVEL, INC., an Oregon corporation; AMERICAN LEGION POST NO. 3, DEPARTMENT OF OREGON, an Oregon non-profit corporation, and the CITY OF EUGENE, OF LANE COUNTY, OREGON, a municipal corporation, et al., Respondents.

****

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

****

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IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1976

No.

RAYMOND N. LOWE, et al.,

Petitioners,

v.

EUGENE SAND & GRAVEL, INC.,
an Oregon corporation, et al.,

Respondents.

****
PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF
OREGON
****

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Oregon entered in the above-entitled case on December, 1976.

I. OPINIONS BELOW

The opinion of the Lane County Circuit Court, the trial court herein, issued May 15,

1975, is attached as Appendix A. This opinion is not an official report.

A copy of the opinion of the Oregon Court of Appeals, issued July 26, 1976, is attached as Appendix B; this opinion is reported at 26 Or App 235, 552 P2d 596.

A copy of the opinion of the Oregon Supreme Court, issued December 16, 1976, is attached as Appendix C; this opinion is reported at 276 Or 1007, 558 P2d 338.

II. JURISDICTIONAL STATEMENT

The date of the judgment sought to be reviewed and the time of entry of the judgment is December 16, 1976; a copy thereof is reported in Appendix D. An order denying a timely motion for rehearing was entered on January 11, 1977; a copy of this order is reprinted in Appendix E.

The statutory provision believed to

confer jurisdiction on this Court to review the judgment is section 1257(3) of Title 28 of the United States Code.

III. QUESTIONS PRESENTED

The question presented for review is:

1. Whether voter approval of a city charter amendment which authorized the city to accept as a war memorial a large cross on public land is sufficient to avoid an earlier decree of the Oregon Supreme Court holding the public sponsorship of the cross to be a violation of the First Amendment.

IV. ORDINANCE AND CONSTITUTIONAL PROVISION INVOLVED

The city charter amendment the validity and effect of which is involved, Section 153 of Part 1, Miscellaneous Provisions of the Eugene City Charter, provides as follows:

"Section 1. That the City of Eugene be and is hereby empowered, and by this Act does, accept a gift of the concrete structure in the form of a cross now located on the south slope of Skinner's Butte Park."

"Section 2. That the concrete cross structure shall remain at said location and in said form and is hereby dedicated as a memorial and monument to the war veterans of all wars in which the United States has participated and that said memorial shall hereinafter be known as the "Veterans War Memorial Cross."

"Section 3. That the American Legion, Eugene Post No. 3 be and is hereby authorized at its own expense to prepare and affix to said structure a suitable and fitting plaque and other ornamentations consistent with the intendments of this act."

"Section 4. That the control and lighting of said structure is hereby designated as a responsibility of the Park and Recreation Department of the City of Eugene and is hereby directed to light on appropriate days or seasons which fittingly represent the patriotic aspects, aspirations and sacrifice of war veterans, including but not limited

to, Memorial Day, Independence Day, Thanksgiving, and the Christmas Season, and Veterans Day."

The validity and effect of this statute is to be determined under the following provision of the United States Constitution:

"Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

* * * * *

V. STATEMENT OF THE CASE

The subject matter of this litigation is a large Latin cross located in a municipal park high on a hill overlooking the City of Eugene. In an earlier decision, Lowe v. City of Eugene, 254 Or 518, 451 P2d 117, 459 P2d 222, 463 P2d 360 (1969), cert. denied, 397 US 1042, rehearing denied, 398 US 944 (1970), the Oregon Supreme Court found the City's authorization of the erecting of that cross by private parties to be in violation of the state and federal constitutions. A copy of that opinion is attached as Appendix F.

Following that ruling by the Oregon Supreme Court a petition for certiorari was filed. During that process American Legion Post No. 3, assisted by an organization designated the "American Rights Council, Inc.", circulated petitions to place the challenged charter amendment on the ballot by the initiative process. The American Rights Council was formed with the avowed purpose of "saving the cross"; the President of that organization is an ordained minister.

These efforts were successful, and the charter amendment was approved by a vote of the municipal electorate, approximately 17,000 to 6,000.

Within a few days thereafter, Eugene Sand and Gravel, one of the original Defendants, filed this suit to avoid the effect of the earlier decree, relying upon the charter amendment and things done incidental thereto as "new matter" sufficient to overcome that decree pursuant to an Oregon statute which permits that procedure, ORS 16.460(1). That statute provides in relevant portion that "a decree in equity may be impeached and set aside, suspended, avoided or carried into execution by an original suit."

The original Plaintiffs, Petitioners herein, were named as Defendants, as were all other parties in the original litigation. American Legion Post No. 3 was permitted to enter the case as a Plaintiff in intervention since certain duties devolved upon it as a result of the charter amendment. Its

complaint relied upon the same "new matter."

At trial, Petitioners introduced evidence in the form of a professional opinion poll of the City electorate which found that 81% considered the cross to still be primarily a religious symbol after the election.

Respondents produced no witnesses who testified that the election changed the manner in which they viewed the cross; an expert witness in semantics and symbolism produced by them testified only that placing a new "label" on the cross would "tend to increase" the probability of a wider meaning for that symbol. On cross examination, he testified that it was a likely possibility that people in Eugene really voted the way they did to preserve their dominant religious symbol.

The trial court ruled that the charter

amendment was not "new matter" sufficient to avoid the earlier decree. A unanimous panel of the Oregon Court of Appeals affirmed. The Oregon Supreme Court by a 4-3 decision reversed, and by a 3-2 margin denied rehearing.

Preservation of Federal Question

The issue of the validity and effect of the charter amendment was first raised by the pleadings in the trial court. The relevant excerpts from the pleadings are attached as Appendix G.

The opinions of all of the courts involved have dealt with the issue here raised as the central issue since it was the one raised by the pleadings and litigated.

VI. REASONS RELIED UPON FOR ALLOWANCE OF WRIT

1. The decision of the Oregon Supreme Court is in conflict with numer-

ous decisions of this Court and with the spirit of a constitutional democracy.

In permitting a majority to exercise its political power to overbear the constitutional rights of the minority -- those who do not desire to see the government involved or entangled in the sponsorship of Christian religion -- the Oregon Supreme Court has lost sight of principles espoused even before the adoption of our Constitution. In the Federalist No. 10, Madison lamented that:

> "***Complaints are everywhere heard from our most considerate and virtuous citizens . . . that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority."

Later, in Federalist, No. 52, Madison or Hamilton further discussed this inborn difficulty with the principle of majority

rule:

> "It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. . . . In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature. . . "

This Court has been ever mindful of these admonitions. Perhaps the most frequently quoted judicial passage on this subject is found in West Virginia State Board of Education v. Barnette, 319 US 624, 638, 63 S Ct 1178, 1185-1186, 87 L Ed 1628 (1943):

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.

> One's right to life, liberty, and property, to free speech, a free press, freedon of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

Subsequent to the decision in Barnette, this Court has reaffirmed the principle that

> ". . . A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be."

Lucas v. Forty-Fourth General Assembly of Colorado, 377 US 713, 736-737, 84 S Ct 1459, 1474, 12 L Ed 2d 632 (1964). This Court is not being asked to determine whether the cross in question is primarily a religious symbol by purpose or effect, or whether there is excessive government entanglement with religion. Those questions have been answered by

the first Oregon Supreme Court opinion in the affirmative. The only question before this Court is whether that result may be avoided by plebiscite.

VII. CONCLUSION

The principle that is at stake in this case goes to the heart of our form of government. Due to the nature of a constitutional democracy problems of a similar nature will occur with more and more frequency if the fundamental rights of unpopular minorities are allowed by the judiciary to be subject to the will of the majority.

This Court as the final bastion against pure majority rule, should re-affirm the strength of the Bill of Rights in this case, and demonstrate that the constitutional shield with which it pro-

tects the rights of the minority is not so thin as feared by the dissent in the Oregon Supreme Court.

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

TRIAL COURT OPINION

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF LANE

EUGENE SAND & GRAVEL, INC., an Oregon corporation,

Plaintiff,

vs.

CITY OF EUGENE, of Lane County, Oregon, a municipal corporation; EDWIN E. CONE, in his official capacity as Mayor of Eugene; LESTER E. ANDERSON, JOHN O. CHATT, R.G. CRAKES, RAY HAWK, BRUCE A. LASSEN, CATHERINE LAURIS, R.E. McNUTT, GLEN L. PURDY, each in his official capacity as a member of the Common Council of Eugene; DAVID D. CAMPBELL, dba C&S ELECTRIC; ALLEN E. HAMILTON, ALLEN E. HAMILTON, JR., LILLIAN T. HAMILTON, KENNETH W. HAMILTON, J.F. OLDHAM & SON, INC.,

All Original Defendants in Lane County Circuit Court Case No. 76-314; and

LESTER E. ANDERSON, in his official capacity as Mayor of Eugene, H.C. McDONALD, CHARLES E. TEAGUE, GLEN L. PURDY, NANCY

Case No. 99775

OPINION

HAYWARD, WICKES BEAL, IVAN J. GRIBSKOV, FRED J. MOHR, and TOM WILLIAMS, each in his or her official capacity as a member of the Common Council of Eugene; JAY F. OLDHAM AND SON, INC., an Oregon corporation; HARRY MARLOWE, Sheriff of Lane County, Oregon; and LEE JOHNSON, Attorney General of the State of Oregon; and

RAYMOND N. LOWE, CORRINNE R. HILL, W.A. BROOKSBY, ABE BROOKS, G. DOUGLAS STRATON, ALFRED BLOOM, JAMES WITZIG, CLAIRE L. NEWPORT, DIRK P. TEN BRINKE and E. JEAN WARE,

All Original Plaintiffs in Lane County Circuit Court Case No. 76314,

Defendants.

OPINION

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF LANE

MAERICAN LEGION POST #3, DEPARTMENT OF OREGON, a non-profit corporation of the State of Oregon, for and on behalf of all duly constituted and organized Veterans organizations with chapters or posts located within the City of Eugene,

Plaintiff in Intervention

vs.

CITY OF EUGENE, Lane County, Oregon, a municipal corporation; EDWIN E. CONE, in his official capacity as Mayor of Eugene; LESTER E. ANDERSON, JOHN O. CHATT, R.G. CRAKES, RAY HAWK, BRUCE A. LASSEN, CATHERINE LAURIS, R.E. McNUTT, GLEN L. PURDY, each in his official capacity as a member of the Common Council of Eugene; DAVID D. CAMPBELL, dba C&S ELECTRIC; ALLEN E. HAMILTON, ALLEN E. HAMILTON, JR., LILLIAN T. HAMILTON, KENNETH W. HAMILTON, J.F. OLDHAM & SON, INC.

All original Defendants in Lane County Circuit Court Case No. 76-314; and

LESTER E. ANDERSON, in his official capacity as Mayor of

Case No. 99775

Eugene; H.C. McDONALD, CHARLES E. TEAGUE, GLEN L. PURDY, NANCY HAYWARD, WICKES BEAL, IVAN J. GRIBSKOV, FRED J. MOHR and TOM WILLIAMS, each in his or her official capacity as a member of the Common Council of Eugene; JAY F. OLDHAM AND SON, INC., an Oregon corporation; HARRY MARLOW, Sheriff of Lane County, Oregon; and LEE JOHNSON, Attorney General of the State of Oregon; and

RAYMOND N. LOWE, CORRINNE R. HILL, W.A. BROOKSBY, ABE BROOKS, G. DOUGLAS STRATTON, ALFRED BLOOM, JAMES WITZIG, CLAIRE L. NEWPORT, DIRK P. TEN BRINKE and E. JEAN WARE,

All original Plaintiffs in Lane County Circuit Court Case No. 76-314,

Defendants to Complaint in Intervention

Case No. 99775

This is a suit to set aside the decree on mandate of Lowe v. City of Eugene, 254 Or. 518, 451 P.2d 117, 459, P.2d 222, 463 P. 2d 360 (1969), appeal dismissed 397 U.S. 591 (adequate state grounds), cert. denied 397 U.S. 1042, reh. denied 398 U.S. 944 (1970) (Lane County Cir. Ct. No. 76314), under ORS 16.460 (1)(1973), which provides, in pertinent part, that "a decree in equity may be impeached and set aside, suspended, avoided or carried into execution by an original suit."

It is the opinion of the Court that the sole basis for this suit arises from the allegations contained paragraphs III and IV of Plaintiff's Amended Complaint, paragraphs VIII through XI of Plaintiff in Intervention's Amended and Supplemental Complaint, and paragraphs IV through VII of the cross-bill contained in "City Defendants'" Amended Answer and Cross-Complaint. The

evidence introduced by these parties and received by the Court has not been considered for any other purpose. Insofar as it pertains to issues already litigated, or which could have been litigated in the Lowe case, this evidence has been disregarded. That is to say, the Court does not consider as a proper basis for this suit these parties' "newly discovered evidence" argument, namely, that the Court should look back to October 8, 1934, when Skinner Butte Park was dedicated as a war memorial park, and review the history of the cross on the butte up to the time of the trial of the case at bar.

The "War Memorial Park" issue raised in Lowe v. City of Eugene, supra, has been decided. 254 Or. at 543. If it was in fact not litigated, it could have been litigated, because the above parties could have raised the issue and presented such evidence

had they exercised due diligence. Crews v. Richards, 14 Or. 442, 13 P.67 (1887). That the pleading of the issue was stricken from their affirmative defense in the Lowe case is of no import: The parties at least could have offered evidence under a general denial. If a party cannot maintain an original suit under ORS 16.460(1) where he claims he merely was misled by his opponents' pleadings, Crews v. Richards, supra, he cannot maintain one where his own affirmative pleadings were stricken and not attempt to raise the issue under the pleadings as amended. Furthermore, these parties have failed to prove that this issue was not raised due to their excusable neglect. Hartley v. Rice, 123 Or. 237, 261 P. 689 (1927).

Therefore, the evidence of the history of the park through the Lowe case is material only insofar as it provides a context

for considering the evidence which pertains to the above-mentioned allegations.

Under an original suit to set aside a decree, the parties may present whatever evidence would have been proper under the abolished formal chancery bills. White v. Allen, 3 Or. 103 (1869). This suit is in the nature of a bill of review, Heatherly v. Hadley, 4 Or. 1 (1869); Smith v. Nelson, 46 Or. 1, 78 P.740 (1905), and under language quoted approvingly by the Supreme Court in McLeod v. Lloyd, 45 Or. 67, 69, 75 P.702 (1904),

> "'The law relative to bills of review,' says Mr. Justice GABBERT, in Warren v. Adams, 26 Colo. 404 (60 Pac. 632), 'is based upon Lord Bacon's ordinance, which provided: "No decree shall be reversed, altered or explained, being once under the great seal, but upon bill of review, and no bill of review shall be admitted except it contain **some new matter which hath arisen in time after the decree, and not any new proof which might have been used when the decree was made. Nevertheless, upon new matter

that has come to light after decree made, and could not possibly have been used at the time when the decree passed, a bill of review may be granted by the special license of the court, and not otherwise."'"

See Heatherly v. Hadley, supra, 4 Or. at 8.

It is the holding of the Court that the allegations of the above-mentioned paragraphs constitute allegations of new matter arising after the decree, for which a bill of review would have been admitted and which under ORS 16.460(1) state a cause of suit. Therefore, it is not necessary to deal with the issue considered by Hilts v. Ladd, 35 Or. 237, 244, 58 P.32 (1899), wherein the Court required that new evidence must be so decisive as to compel reversal and should be documentary in nature. That case merely attempted to avoid cumulative evidence on issues already litigated, a matter which this Court already has disposed of.

II

In order to determine how the allegations of the parties allied with Plaintiffs, as discussed in Part 1 of this Opinion, supra, constitute "new matter" of such a character as to enable this Court to set aside the decree in the Lowe case, it is necessary to determine exactly what were the grounds for decision therein. In order to do this, the Court has looked to the first Lowe opinion, Lowe v. City of Eugene, supra, 254 Or. at 520-29, the dissenting opinion thereto by Justice Goodwin, id. at 532-33, his opinion on rehearing, id. at 535-39, and his opinion denying further rehearing, id. at 541-48.

The first opinion in the Lowe case reversed the trial court's decree that the cross must come down, set aside the trial court's ruling on non-constitutional grounds,

and held, id. at 529:

"We do not believe that the erection and maintenance of the cross in question amounts to a religious activity which violates the applicable provisions of the Oregon Constitution or the First and Fourth Amendments of the United States Constitution.

"The official action of the City of Eugene in issuing the building and lighting permits for the cross a few days after it was erected, and after a widely publicized and well attended public hearing, constituted formal permission of the city for it to remain there at no cost to the city."

This holding was based on a finding, id. at 528-29,

"that to many people the cross...carries connotations that are not essentially religious in character and to such people it has primarily secular meanings. There is nothing in the evidence which reasonably supports an inference that the purpose of the defendants in erecting the cross was to promote the participation by anyone in, or the advancement or inhibition of, any religious belief or organization, or that such was its primary effect."

On rehearing, Justice Goodwin stated, id. at 539, that "the decree of the trial court should be affirmed for the reasons

substantially as set forth in the dissenting opinion..." That opinion arrived at findings different from the first opinion and went on to hold, id. at 533,

"Whether so intended by the city council or not, the city's participation in the [cross] display has placed the city officially and visibly on record in support of those who sought government sponsership for their religious display.

"For the foregoing reasons, I would affirm the judgment below."

On petition for rehearing, which was denied, the opinion stated, id. at 548, that "it is the enlistment of the hand of government to erect the religious emblem which offends the [provisions of the state and federal] constitutions."

From these quotations, it is clear that the Supreme Court, in affirming the decree of the trial court, did not agree with the trial court's use of non-constitutional grounds of decision, but instead agreed with

the original majority's conclusion that the issue to be decided was the constitutionality of the city's granting of the permits to erect and light the cross. Therefore, what is not at issue in the case at bar is: any issue which actually was litigated in the first trial and on which the trial court based its findings of fact and conclusions of law; the constitutionality of the issuance of permits. These non-issues are in addition to the non-issue of the "War Memorial Park" argument disposed of in Part I of this Opinion, supra.

Therefore, the questions this Court must resolve to determine the outcome of this case are: 1) What effect, if any, does the Charter Amendement of May 26, 1970, have on the Supreme Court's holding in the Lowe case that it was constitutionally impermissible for the City of Eugene

to grant the building and lighting permits? 2) What effect, if any, do the deed of gift of the cross from Plaintiff to the City and the City's acceptance thereof have on said holding in Lowe? 3) What effect, if any, do the events after the Charter Amendment and Deed have on said holding in Lowe?

III

To answer these questions, it is necessary to analyze the Lowe court's holding. The most succient statement for holding the permits invalid is,

> "[Where] land is public, and its custodian is a governmental subdivision..., [it] cannot be set apart for the permanent display of an essentially religious symbol when the display connotes government sponsorship. The employment of publicly owned and publicly maintained property for a highly visible display of the character of the cross in this case necessarily permits an inference of official endorsement of the general religious beliefs which underlie that symbol." Id. at 544 (opinion denying

rehearing).

Although the Supreme Court cited as support for that statement four cases decided by the Supreme Court of the United States, the ground for decision in Lowe appears to combine art. I, §5, of the Oregon Constitution as well as the first amendment to the federal constitution. This is shown by language in the opinion denying rehearing wherein the Oregon Supreme Court stated, id. at 548:

"We are, therefore, content to let stand our statement in the October 1 opinion, which grounded the decision on the merits in this cause in part upon state as well as federal constitutional concepts. We did not intend to rely upon language which is not in our constitution. On the other hand, the language that is in the state constitution shows that the founders of this state did not intend to retreat from the federal position on separation of church and state, but rather intended to emphasize in their own words their own commitment to the doctrine of separation."

Cf. id. at 539 (opinion on first

rehearing).

It is difficult for this Court to determine exactly where in the Lowe case the Supreme Court's rationale leaves the Oregon Constitution and picks up the federal constitution. Because the wording of art. I, §5 , differs from the first amendment, the two provisions are not co-extensive.

In Lowe v. City of Eugene, supra, 254 Or. at 533 (Goodwin, J., dissenting; later the holding of the court), it was said:

"The whole point of separation of church and state in a pluralistic society is to keep the majority from using its coercive power to obtain governmental aid for or against sectarian religious observances. See Dickman et al v. School Dist. 62 C et al, 232 Or 238, 246-247, 366 P2d 533 (1961), cert. denied, 371 U.S. 823 (1962)." On one of the pages cited in Dickman, supra, 232 Or. at 246, there is this statement:

"Article I, §5...was designed to keep

separate the functions of state and church and to prevent the influence of one upon the other. In this respect our constitution ...may be regarded as expressing, in more specific terms, the policy of the First Amendment as it has been explained in [Everson v. Board of Educ. of Ewing Township, 330 U.S. 1, 67 S.Ct. 504, reh. den. 330 U.S. 855, 67 S.Ct. 962 (1947)].

The Lowe court, supra, 254 Or. at 533, apparently had in mind that statement in Everson, supra, 330 U.S. at 11, 67 S.Ct. at 509, and quoted in Dickman, supra, 232 Or. at 246-47 n.13, that "The people... reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group." (Language elsewhere in Everson, supra, 330 U.S. at 16, 67 S.Ct. at 511-12, is much broader and goes beyond supporting or assisting religion.)

It thus appears that the cross in the Lowe case was considered by that court to be an instrument of "sectarian religious observances," and, therefore, because there was present in the permits the "coercive power of the majority" which connoted "government sponsorship" of that instrument, the permits were invalid. The cross as such an instrument apparently was considered a "religious institution" within the meaning of art. I, §5 of the Oregon Constitution.

As noted above, the rationale of the Lowe court was grounded on four cases decided by the United States Supreme Court, and it appears from the final opinion, 254 Or. at 544-45, these four cases are the foundation for what the Lowe court felt was "government sponsorship." Furthermore, it is the opinion of this Court that

the Lowe decision's foundation "in part upon state as well as federal constitutional concepts," 254 Or. at 548, means that "government sponsorship" under art. I, §5, can be determined by looking to United States Supreme Court cases interpreting the establishment clause of the first amendment. (At this point the Court would like to point out that it is aware that art. I, §5, states:

"No money shall be drawn from the Treasury for the benefit of any religeous (sic), or theological institution, nor shall any money be appropriated for the payment of any religeous (sic) services in either house of the Legislative Assembly.--"

There is not mention of anything like "government sponsorship" therein. The Court would be much more at ease if it could decide the case at bar on the federal establishment clause alone. However, the Lowe case expresses the law of this state, and this Court must follow it. The Court cannot

reach a federal constitutional issue until it has disposed of potential corresponding state constitutional issues.)

The final Lowe opinion was delivered on Dec. 19, 1969, and the latest establishment clause case decided by the Supreme Court pertinent to issues therein and cited by the Oregon Court was Epperson v. Arkansas, 393 U.S. 97, 89 S.Ct. 266 (1968). That case, which declared unconstitutional the Arkansas law prohibiting teachers from discussing the theory of the evolution of man because it was contrary to the Book of Genesis, iterated, 393 U.S. at 107, 89 S.Ct. at 272, the test for determining whether a legislative act transgresses the federal establishment clause announced in School Dist. of Abington Township v. Schempp, 374 U.S. 203, 222, 83 S.Ct. 1560, 1571 (1963):

"The test may be stated as follows: What are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."

The Lowe court's understanding of "government sponsorship" also was based on Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261 (1962), and Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203, 68 S.Ct. 461 (1948). If any principle which the Lowe court relied on in Engel can be found, it most likely is the following, 370 U.S. at 429-30, 82 S.Ct. at 1266:

"The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say -- that the people's religions must not be subjected to the pressures of

government for change each time a new political administration is elected to office."

Likewise, in McCollum may be found the following, 333 U.S. at 209-10, 68 S.Ct. at 465: "Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups, and vice versa."

To be gleaned from this discussion is the evolution from broad pronouncements in earlier cases of a workable test to determine establishment clause violations in Schempp. That case, of course, held that laws requiring daily bible readings in public schools (an obviously religious activity) contravened the establishment clause. Engel foreclosed the use of official prayer (an obviously religious activity) in public schools. McCollum invalidated the use of public school build-

ings for religious instruction during school hours. Only in Epperson was the Arkansas "monkey law" not an obviously religiously directed enactment.

After the Lowe case was decided, the Supreme Court of the United States decided Walz v. Tax Comm'n of the City of New York, 397 U.S. 664, 90 S.Ct. 1409 (1970), which held that property tax exemptions to religious organizations for properties used solely for religious worship did not transgress the federal establishment clause. Without citation to Abington, the Court appeared to adopt its test, 397 U.S. at 672-73, 90 S.Ct. at 1413, and pronounced a third factor to be considered, id. at 674, 90 S.Ct. at 1414, namely, "We must also be sure that the end result -- the effect -- is not an excessive government entanglement with religion. The test is

inescapably one of degree." The Supreme Court apparently has not added any more tests since Walz. Determination of establishment clause questions in the subsequent cases, Tilton v. Richardson, 403 U.S. 672, 91 S.Ct. 2091 (1971) (federal grants to church-related colleges); Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105 (1971) (State aid to nonpublic schools); Committee for Public Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 93 S.Ct. 2955 (1973) (State aid to nonpublic schools); Sloan v. Lemon, 413 U.S. 825, 93 S.Ct. 2982 (1973) (tuition reimbursement to parents of nonpublic school children), appears to turn the facts. However, one further observation must be made. The Everson case, which Dickman incorporated into art. I, §5, and upon which Lowe ultimately relied, considered the establishment clause, "a wall of separa-

tion between Church and State." Everson, supra, 330 U.S. at 16, 67 S.Ct. at 512. After the final Lowe opinion, the Supreme Court stated in Walz v. Tax Comm'n of the City of New York, supra, 397 U.S. at 699, 90 S.Ct. at 1411-12:

> "The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: That we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."

With this shift in the federal law, this Court presumes a corresponding shift in Oregon law. This is to say, whereas at the time of the Lowe opinion (on rehearing) the Oregon Supreme Court proabably

viewed the state constitution as requiring a rigid wall of separation between church and state, now the division required by Article I, §5, probably will be "serpentine" and will be based on the Schempp and Walz tests being applied to the facts in each case.

IV

With the precept firmly in mind that the meaning of "government sponsorship" as it derives from art. I, §5, and as explained in Lowe follows federal constitutional law, the Court now turns to the legislative act of the people of the City of Eugene, the Charter Amendment, to determine whether it is "government sponsorship" of an essentially religious symbol. In order to determine this, the Court will use the establishment "tests" of Schempp and Walz as indices of sponsorship. If any one of

the tests registers "positive", then a hodling that the Charter Amendment violates the Lowe precept must follow.

Ordinarily, constitutional litigation involves a challenge by one party to a legislative act. Plaintiff herein, however, does not challenge anything but the Lowe decree. Therefore, the tables are turned, and the burden is on Plaintiff to prove the Charter Amendment constitutional. Under the pleadings and Plaintiff's theory of the case, there is no challenge to such to the validity of the amendment; Individual Defendants' position merely is that it has no effect.

Does the Charter Amendment reflect a secular legislative purpose? There is nothing in the wording of the Amendment itself that discloses anything but a secular legislative purpose. Similarly, there is

no evidence in the record which requires a contrary finding. The case at bar is like Epperson v. Arkansas, supra, in the neutrality of the wording of the legislative act. Unlike Epperson, however, there is no evidence to dictate a finding that the inspiration behind the legislative act was religiously motivated. Individual Defendants' Exhibits B and C, advertisements of amicus American Rights Council, Inc., to finance appeal costs of the Lowe case, are insufficient for this Court to draw an inference that the people of Eugene voted to amend the city charter due to religious motivation. See Epperson v. Arkansas, supra, 393 U.S. at 108 n.16, 89 S. Ct. at 292 n.16.

Similarly, the evidence shows that the activities of the American Legion in organizing a petition drive to place the amend-

ment on the ballot were purely secular. See American Legion Exhibit 6 (Minutes of Legion executive committee, Feb. 7, 1966). Oral Robbins of the Legion testified that while the original proceedings in the Lowe case might have been what sparked the petition, it was his recollection that the drive for war memorial dedication started before the commencement of the law suit. He further testified that the dedication was necessary because the Legion felt the country was "straying away" from the ideals of patriotism. Whether "patriotism" in the eyes of the Legion encompasses the people's "right" to maintain a religious symbol on public property was not explored. Mr. Carl W. Carmichael, an expert witness for Plaintiff in the field of symbolism, testified that there was a "likely possibility" that the people of Eugene would vote for the

Charter Amendment as an effort to keep the cross atop Skinner Butte because of its "dominant religious meaning", that of a symbol of Christianity, which it had at the time of the Lowe case. A "likely possibility" of religious motivation is not the same as direct evidence of such motivation, but it does tend to contradict the other evidence mentioned above.

Such contradiction, however, is not determinative. The evidence presented at trial demonstrates that, objectively, the movement behind the Charter Amendment was primarily secular in purpose. The Court cannot speculate whether the proponents of the amendment and the citizens who voted for it were spurred by religious motives. The Individual Defendants in their case in chief had an opportunity to present such rebuttal evidence. Absent

such evidence, the Court holds that Plaintiff has proved, by a preponderance of the evidence, the secular purpose of the amendment.

Is the primary effect of the Amendment to further or inhibit religion? The evidence at trial shows that, so far as organized groups are concerned, all public activity surrounding the cross has been in the secular context of a war memorial. The appropriateness of a cross as a war memorial because of the context of the Christian heritage of the United States is an issue the Court does not need to explore. The Court is impressed by the fact that veterans groups, whether they be the VFW, the American Legion, or the Vietnam Veterans Against the War, have treated the cross solely as a war memorial. (In fact, the Court is most impressed with

the activites of the VVAW, because of the philosophical distance between them and the more "traditional" veterans groups; their use of the cross as a memorial tends to show that at least under certain circumstances the cross can be a symbol not "essentially religious" for individuals not connected with, and with no "vested" interest in, a petition campaign to attempt to avoid the possible effects of a judicial decree.)

There was much testimony about the nature of symbols, the necessity of a "context" within which an object becomes a symbol for something, and the ways in which a change of context affects the meaning of a symbol. This Court must acquiesce in a judicial determination in the Lowe case that, at least until the Charter Amendment election of May 26, 1970, the cross on Skinner Butte was an "essentially religious

symbol." Mr. Carmichael testified that what a symbol means depends on six factors: 1) time; 2) circumstances; 3) context; 4) source; 5) an individual's perceived reaction to the symbol's source; and 6) semantic context. More specifically, an object can have one meaning at one time, another meaning at another time; one meaning under some circumstances, another meaning under others; and so on down the list.

Context probably can be defined as the particular environment which the object occupies; human actions upon, or dealing with, an object are as important as part of context as the physical situation in which a symbol is found. The meaning which humans attach to symbols varies as to context, and new meanings can be taken on. Mr. Carmichael testified that the fact that the Charter Amend-

ment election was held <u>could</u> affect the symbolism attached to the cross. He would not state a "probability level" for this effect. He did testify, however, that when new associations are given to a symbol, it can take on a new meaning, and that more associations by the people given to the cross as a war memorial, the more likely its meaning will increase as a war memorial. From this, the Court infers that the residents of the City of Eugene who have followed the history of the Skinner Butte cross through the Amendment and subsequent war memorial use occasions <u>could</u> so interact with the cross as a symbol as to ascribe to it a primary meaning of "war memorial." The same witness testified upon recross examination by the Individual Defendants that a symbol can have a dominant meaning

and that some meanings may be localized. Because the dominant meaning of a Latin cross within the world semantic community (wherein people have "agreed" to the meaning of a symbol, with a certain amount of variations) is that of Christianity, the sacrifice of Christ (Testimony of Dean McKenzie, Hee Jin Kin), a member of that semantic community outside of the "informed" Eugene semantic community probably will ascribe to the cross a "primarily religious" meaning. The problem for the Court here is to determine whether the Amendment has a "primary effect" of advancing religion in terms of a possible Eugene "informed" semantic community or an "uninformed" semantic community of the rest of the world.

The operative effect of the Charter Amendment in the objective world and fact

was to enable a concrete structure in the form of a Latin cross, which heretofore had been declared judicially to be a religious symbol, to have affixed to it an official label of and a plaque designating it a "war memorial", and to allow that structure to remain standing in a public park long enough, during the pendency of this suit and immediately prior thereto, to have various veterans' groups perform certain functions with that structure as their focus.

It appears from the evidence that only for those individuals who are members of or who later join the possible "informed" semantic community does the cross have the potential of being a symbol "not essentially religious" maintained by an act of government. An individual not of the Eugene semantic community who encounters the cross,

unaware of the associations which the cross has acquired since the amendment, still most likely will see the symbol of Christianity. His encounter will be subjective, and, if he learns of the history of the cross and its context, his subjective encounter may be so changed as to allow him to join the possible Eugene semantic community.

The evidence does not allow an inference that this Eugene semantic community in fact does exist. And, if it <u>should</u> exist, would its characterization of the cross on Skinner Butte differ basically from that of the rest of the world?

The testimony at trial overwhelmingly indicates that a Latin cross is "<u>the</u> Christian symbol" (testimcny of Stanley Pierson, a specialist in European cultural history), for which there has not been found any meaning in art history other than the

symbolism of the sacrifice of Christ (testimony of art history professor Dean McKenzie). Cross examination of Prof. McKenzie by Plaintiff disclosed that the cross was never used as a grave marker before the time of Christ. As stated in the Brief for Plaintiff Intervenor the American Legion, "the cross. . . has become a symbol for death and, in a war memorial, it is death and the sacrifice of the dead that is memorialized." The ultimate question was never asked during the presentation of the evidence, but the only inference the Court can draw from the evidence and from history is that the use of the cross as a symbol of death and sacrifice of the fallen soldier is derived from the crucifixion of Christ who sacrificed his life for all mankind. Therefore, the Court concludes that even when the "informed" Eugene semantic community possibly

could see a "secular" war memorial, that symbol ultimately derives its meaning from the primary symbol of Christianity. In this sense, the views of the possible Eugene semantic community and the "uninformed" semantic community consisting of the rest of the world coincide.

One objective fact remains constant. There remains a cross atop Skinner Butte, maintained by an act of the people. Because this objective fact has remained constant before and after the Charter Amendment election, because the semantic community outside Eugene considers a Latin cross to be the symbol of Christianity, and because the possible "informed" Eugene semantic community's view of the cross as a war memorial derives from Christianity, the only conclusion this Court can draw is that the "primary effect" of the Charter Amendment is

to maintain on public property an "essentially re. .gious symbol." Therefore, the Court in this instance must hold that Plaintiff has failed to prove a change of circumstances sufficient to set aside the Lowe decree, namely, that the Amendment does not further religion.

The question therefore remains whether the Charter Amendment will lead to excessive government entanglement with religion. Had the Court been able to hold that the primary effect of the Amendment was not to encourage religion, it would be easy to hold that there would not be such excessive entanglement: There would be no religion with which to entangle. Here the character of the cross on Skinner Butte, for the world, and derivatively for the possible Eugene semantic community, is that of a primarily religious symbol. Because the Charter Amendment charges the City of Eugene with the duty of maintain-

ing the cross and lighting it on certain specified occasions, there is and will be a continuing involvement with a primarily religious symbol such as to constitute an excessive government entanglement with religion as understood in Walz. Plaintiff has failed to prove anything to the contrary.

Plaintiff has failed to prove by a preponderance of the evidence that the Charter Amendment falls outside the scope of the two of the three federal tests as incorporated into Article I, §5, of the Oregon Constitution by the Lowe decision, and therefore it is the holding of the Court that Plaintiff has failed to prove that the Amendment does not contravene Article I, §5, and that the Amendment and its effects are sufficient to set aside the decree in the Lowe case.

Because this case can be disposed of solely by reference to the Oregon Constitution (even though interpretation thereof requires reference to the United States Supreme Court cases interpretive of the federal first amendment), there is no need for the Court to discuss any issue directly involving the federal constitution.

The Court is well aware that today's decision may appear to be contrary to holdings in other cases which allowed crosses to remain on public property. This Court, however, is bound by the law of Oregon as expressed in the Lowe opinions and to a certain extent by the facts determined in that case. Furthermore, this Court can decide the case at bar only on the evidence presented to it and on facts of which judicial notice can be taken. For these reasons, the Court is not bound by

the following cases brought to its attention by counsel.

In Paul v. Dade County, 202 So. 2d 833 (Fla. Ct. App.), cert. denied 207 So. 2d 690 (Fla. 1967), cert. denied 390 U.S. 1041 (1968), the case was decided on evidence in the record of a non-religious purpose and non-public finding of a Christmas cross on the outside wall of a public building. Similarly, in Meyer v. Oklahoma City, 496 P.2d 789 (Okla.), cert. denied 409 U.S. 980 (1972), it was held that maintenance of a Latin cross on public property, because of its purely secular setting, did not violate the state's constitution; no federal constitutional issue was raised. The Tenth Circuit, in Anderson v. Salt Lake City Corp., 475 F.2d 29 (10th Cir.), cert. denied 414 U.S. 879 (1973) (Douglas, Brennan, and Marshall, J.J., would grant cert-

iorari), overruled the trial court's findings to hold, amazingly enough, that a monument inscribed with the decalogue was primarily secular in purpose and effect. In Allen v. Morton, 495 F.2d 65 (D.C. Cir. 1973), the court found from the evidence that the Christmas pageant in question was "substantially secular"; that government involvement with a creche scene therein was constitutionally permissible because of the secular nature of the pageant, the use of the creche as a historical example of the people's religious heritage, presence of placques disclaiming establishment of religion by the United States, and limitation of government involvement to non-creche activities of the pageant; and the fact that the creche was considered as part of a secular pageant and not alone.

The Court is willing to concede that

from this brief recitation, especially of Morton and Anderson, it would appear that the Court should find the cross on Skinner Butte to be primarily secular. Those cases, like this one, were based on facts presented to courts, and the courts made their decisions based on the evidence received at trial. The situation is the same here, and the Court bases its decision today only on the evidence received at trial, on the principles of law applicable to this case, and in particular the binding effect upon this Court of the decision of the Supreme Court of the State of Oregon in the Lowe case, which appears to be unique in American jurisprudence in that it is the only case in which an appellate court has approved a determination that a symbol which could be deemed religious must be removed from public property.

The decree on mandate of the Lowe case shall not be set aside.

This Opinion shall constitute the Court's Findings of Fact and Conclusions of Law. The Individual Defendants appearing herein are entitled to a Decree dismissing the Amended Complaint of the Plaintiff, dismissing the Amended Answer and Cross-Complaint of the City Defendants, and dismissing the Amended and Supplemental Complaint in Intervention of the Plaintiff in Intervention. Costs and disbursements herein shall be awarded to none of the parties hereto.

Mr. Hammons and Mr. Swanson are directed to prepare an appropriate Decree, submit the same to be signed for approval as to form by Mr. Wheatley, Mr. Gardner, and Mr. Walton and when approved, to submit the Decree to the Court.

DATED this 15 day of May, 1975.

/s/ Edwin E. Allen
Circuit Judge

APPENDIX B

No. 357—July 26, 1976

IN THE COURT OF APPEALS OF THE STATE OF OREGON

EUGENE SAND & GRAVEL, *Appellant,*
and
AMERICAN LEGION POST #3,
Intervenor-Appellant,
v.
CITY OF EUGENE et al, All original Defendants in Lane County Circuit Court Case #76314; and ANDERSON et al, All original Plaintiffs in Lane County Circuit Court Case #76314,
Respondents.

(No. 99775, CA 4879)

Appeal from Circuit Court, Lane County.

Edwin E. Allen, Judge.

Argued and submitted June 24, 1976.

***William G. Wheatley,* Eugene, argued the cause for appellant Eugene Sand & Gravel, Inc. With him on the briefs were Jaqua & Wheatley, Eugene.**

***Dudley C. Walton,* Assistant, Department of Judge Advocate, Department of Oregon American Legion, Roseburg, argued the cause for intervenor-appellant American Legion Post #3, Department of Oregon. With him on the briefs was C. S. Emmons, Judge Advocate District #3, Department of Oregon American Legion, Albany.**

***Leslie M. Swanson, Jr.,* Eugene, argued the cause for respondents individual defendants. With him on the brief were Terence J. Hammons and Hammons, Phillips & Jensen, Cooperating Attorneys, American Civil Liberties Union of Oregon, Eugene.**

***Jack A. Gardner,* Eugene, appeared for respondents city defendants.**

***Larry R. Roloff,* Eugene, filed a brief amicus curiae for American Rights Council, Inc.**

Before Schwab, Chief Judge, and Foley and Thornton, Judges.

Affirmed.

SCHWAB, C. J.

SCHWAB, C. J.

This case involves a 51-foot-tall prestressed concrete tapered Latin cross located in a city park on a hill in Eugene, Oregon. This cross has been the subject of extensive litigation in the trial court in the 1960's and numerous opinions of the Supreme Court during the year 1969 commencing at 254 Or 518 under the title of *Lowe et al, Respondents, v. City of Eugene et al, Defendants, Eugene Sand & Gravel, Inc., Appellant.*[1] This prior litigation finally resulted in a decree on mandate directing the removal of the cross in accordance with the Supreme Court's decision that it was primarily a religious symbol, the maintenance of which on public property was violative of both the state and federal constitutions.

For reasons it is not necessary to discuss here, the cross remains, and the issue of whether it shall stay or go is now before us as a result of further litigation commenced by the plaintiffs in June of 1970 in the form of a suit brought under the provisions of ORS 16.460(1) which provides in pertinent part that "* * * a decree in equity may be impeached and set aside, suspended, avoided or carried into execution by an original suit."

Plaintiff's complaint sought to invoke the jurisdiction of the trial court on the basis of "New Matter (Material Events Happening After the Decree)" and "Newly Discovered Evidence." The trial court properly held that what the plaintiff contended was newly-discovered evidence was in fact only evidence which could have been produced and considered in the original trial, if in fact it was not then actually considered,

[1]The appellate history of *Lowe v. City of Eugene*, 254 Or 518, 451 P2d 117, 459 P2d 222, 463 P2d 360 (1969), is:

"Argued January 6, reversed and remanded February 26, petition for rehearing allowed April 23, petition for reconsideration of rehearing denied with leave to renew May 15, reargued June 2, former opinion withdrawn; decree affirmed October 1, petition for rehearing denied December 19, 1969. Petition for writ of certiorari and appeal denied by United States Supreme Court April 20, petition for rehearing denied by United States Supreme Court June 1, 1970."

and therefore not entitled to consideration in the current suit. The trial court did consider the new matter which was that on May 26, 1970, the people of Eugene adopted a charter amendment empowering the city to accept a deed of gift of a "concrete construction in the form of a cross." Under authorization contained in the amendment, the structure was dedicated as a "monument and memorial to * * * war veterans * * *" and was to be called "Veterans War Memorial Cross." The trial court ruled that the decree on mandate of the *Lowe* case should not be set aside, and we agree.

The essential thrust of the decision in *Lowe v. City of Eugene, supra,* is:

> "Public land cannot be set apart for the permanent display of an essentially religious symbol when the display connotes government sponsorship. * * *" 254 Or at 544.
>
> "* * * Those who argue that the cross is a mere secular symbol ignore 2,000 years of history." 254 Or at 546.

The charter amendment does not change the cross.

Affirmed.

APPENDIX C

No. 292—December 16, 1976

IN THE SUPREME COURT OF THE STATE OF OREGON

In Banc

EUGENE SAND & GRAVEL, INC., *Petitioner,*
and
AMERICAN LEGION POST #3,
Petitioner,
v.
CITY OF EUGENE et al, *Respondents.*
(CA 4879, SC 24696)

On review from Court of Appeals.*

Argued and submitted November 1, 1976, at Eugene.

William G. Wheatley, of Jaqua & Wheatley, Eugene, argued the cause and filed briefs for petitioner Eugene Sand & Gravel, Inc. With him on the reply brief were Dudley C. Walton, of Geddes, Walton & Richmond, Roseburg, and Larry R. Roloff, Eugene.

Dudley C. Walton, Assistant, Department of Judge Advocate, Department of Oregon American Legion, Roseburg, argued the cause for petitioner American Legion Post #3, Department of Oregon. With him on the brief was C. S. Emmons, Judge Advocate District #3, Department of Oregon American Legion, Albany.

Leslie M. Swanson, Jr., Eugene, argued the cause for individual respondents. With him on the brief were Terence J. Hammons, of Hammons, Phillips & Hensen, Cooperating Attorneys, American Civil Liberties Union of Oregon, Eugene.

Larry R. Roloff, Eugene, filed a brief Amicus Curiae for American Rights Council, Inc.

Reversed.

TONGUE, J.

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*Appeal from Circuit Court, Lane County. Edwin H. Allen, Judge. 26 Or App 235, 552 P2d 596 (1976).

TONGUE, J.

This is a suit in equity under ORS 16.460(1) to set aside a previous decree by this court upon the ground that "circumstances have changed materially" since the entry of that decree.

In 1969 this court held that the City of Eugene had violated the state and federal constitutions by authorizing the erection by private parties of a large cross on Skinner's Butte, a municipal park. *Lowe v. City of Eugene*, 254 Or 518, 451 P2d 117, 459 P2d 222, 463 P2d 360 (1969), cert denied, 397 US 1042, reh denied, 398 US 944 (1970). Our decision affirmed the decree of the Lane County Circuit Court ordering the removal of the cross from the park.

The cross has never been removed. In June 1970 plaintiff filed this suit. The amended complaint alleges that subsequent to our decision the circumstances have changed materially in that on May 26, 1970 a charter amendment was approved by the voters of the City of Eugene accepting the cross as a "memorial or monument to United States war veterans"[1] and that a deed of gift to the cross was delivered to and accepted by the city.

[1]That charter amendment is as follows:

"THE CITY OF EUGENE DOES ORDAIN AS FOLLOWS:

"BE IT ENACTED BY THE ELECTORS OF THE CITY OF EUGENE, OREGON, that Section 153 of Part I, Miscellaneous Provisions of the Eugene City Charter be and the same is hereby amended to add the following provisions thereto:

"*Section 1.* That the City of Eugene be and is hereby empowered, and by this Act does, accept a deed of the concrete structure in the form of a cross now located on the south slope of Skinner's Butte Park.

"*Section 2.* That the concrete cross structure shall remain at said location and in said form and is hereby dedicated as a memorial and monument to the war veterans of all wars in which the United States has participated and that said memorial shall hereinafter be known as the "Veterans War Memorial Cross."

"*Section 3.* That the American Legion, Eugene Post No. 3 be and is hereby authorized at its own expense to prepare and affix to said structure a suitable and fitting plaque and other ornamentations consistent with the intendments of this act.

(Continued on following page)

The City of Eugene, named as one of the defendants, filed an answer and cross-complaint admitting these allegations and also asking that the decree in *Lowe* be set aside. That answer also alleged that pursuant to the charter amendment the cross had been dedicated in a public ceremony as a "Veterans War Memorial Cross" by the American Legion and that a suitable plaque had been prepared by it and affixed to the cross.[2]

Mr. Raymond N. Lowe and the other individual defendants (who were the plaintiffs in *Lowe* and will be referred to as "defendants") demurred unsuccessfully to the complaint and cross-complaint and then filed an answer denying the allegations of change of circumstances (except for adoption of the charter amendment) and alleging affirmative defenses of res judicata and collateral estoppel.

The case was then tried in December 1974. On June 23, 1975 the trial court entered a decree dismissing the complaint. Plaintiff appealed from that decree. The Court of Appeals affirmed. 26 Or App 235, 552 P2d 596 (1976). A petition for review was then granted by this court.

In opposing the relief demanded by plaintiff and by the City of Eugene it is contended by defendants that the "real issue" is "whether the charter amendment transformed an essentially religious symbol into something secular"; that "as a matter of res judicata" (as a

(Continued from previous page)

"*Section 4.* That the control and lighting of said structure is hereby designated as a responsibility of the Park and Recreation Department of the City of Eugene and is hereby directed to light on appropriate days or seasons which fittingly represent the patriotic aspects, aspirations and sacrifice of war veterans, including but not limited to, Memorial Day, Independence Day, Thanksgiving, and the Christmas Season, and Veterans Day."

[2]The complaint also named as defendants the Mayor and members of the city council who joined with the City of Eugene in that answer and cross-complaint. American Legion Post No. 3 filed a complaint as intervenor also asking to set aside the decree in *Lowe v. City of Eugene*, 254 Or 518, 451 P2d 117, 459 P2d 222, 463 P2d 360 (1969), cert denied, 397 US 1042, reh denied, 398 US 944 (1970).

result of the decree in *Lowe*) "the cross was essentially a religious symbol" before the charter amendment; that it is an "erroneous assumption * * * that the acceptance of an essentially religious symbol as a memorial to war veterans somehow transforms the religious symbol to a secular status and meaning"; that to do so would ignore "2000 years of history" and that, as held in *Lowe,* a majority cannot thus "assert its political muscle to gain a preferred place for its testimony to its religious beliefs" because of rights guaranteed by the Constitutions of the United States and the State of Oregon. In support of these contentions reference is also made to testimony to the effect that many people in Eugene regarded the cross as "an essentially religious symbol" both before and after the charter amendment.

This is a proceeding in the nature of a bill of review. Although bills of review are abolished by ORS 16.460(1),[3] that statute authorizes a similar remedy by way of an original suit. In *Heatherly v. Hadley,* 4 Or 1, 8 (1869), the court described the grounds upon which relief may be obtained:

> "A bill of review, for which the Code now substitutes an original suit, was a bill filed to procure an alteration or reversal of a decree made in a former suit. It was requisite that a bill of review show either error in law appearing in the record * * * *Or some new matter that has arisen in time after the decree,* or some discovery after the decree."[4] (Emphasis added)

[3]ORS 16.460(1) provides:

> "Bills of revivor and bills of review, of whatever nature, exceptions for insufficiency, impertinence of irrelevancy, and cross-bills are abolished; but a decree in equity may be impeached and set aside, suspended, avoided or carried into execution by an original suit."

[4]We recognize, however, as stated in 3 Freeman, Judgments 2526-527, § 1216 (5th ed 1925):

> "* * * 'A court of equity will never set aside or enjoin a judgment on the ground of error or mistake in the judgment of the court of law.' * * * for it is universally conceded that a court of equity will not interfere on the ground that in its decision the court of law or other judicial tribunal whose judgment is sought to be enjoined, committed error, whether of law or of fact."

Plaintiff and defendant City of Eugene rely upon what they claim to be a "change in the circumstances" under which the cross is now displayed, as compared with the circumstances under which it was displayed at the time in *Lowe,* as "new matter" sufficient to entitle them to demand that the decree in *Lowe* be set aside. In view of the nature of the issue that arises from this contention we hold that res judicata and collateral estoppel are not defenses in such a proceeding under ORS 16.460(1), assuming, of course, that plaintiff and defendant City have established sufficient "new matter."

We also disagree with defendants' contention that the "real issue" is "whether the charter amendment transformed an essentially religious symbol into something secular." Indeed, plaintiff and defendant City concede that the cross is a religious symbol.

We believe that the basic issue to be decided is not whether this cross was and still is a religious symbol. Instead, we believe the controlling issue to be whether the *display* of the cross on city-owned property under the circumstances existing at the time of the trial of this case, as compared with its display at the time of *Lowe* under the circumstances then existing, satisfies or fails to satsify the test established by the Supreme Court of the United States for application in such cases.

1. *The test of "purpose," "primary effect" and "entanglement."*

The test established by the Supreme Court of the United States for application in determining whether a law is constitutional under the First Amendment "Establishment Clause" is an follows: (1) the law must "reflect a clearly secular legislative purpose"; (2) it must "have a primary effect that neither advances nor inhibits religion" (as distinguished from an "incidental" effect); and (3) it must "avoid excessive govern-

ment entanglement with religion."[5] We hold that this same test is also appropriate for application in determining whether a law is constitutional under similar provisions of the Oregon Constitution.[6]

It is important to bear in mind in the application of this test that this court has always recognized that there is a strong presumption of the constitutionality of all laws.[7] In the application of this test it is also important to bear in mind, as recognized by the Supreme Court of the United States, that the problem of determining the line between state neutrality to religion and state support of religion is "one of degree."[8] Also, as stated in *Zorach v. Clauson,* 343 US 306, 312-13 (1952):

> "* * * The First Amendment * * * does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. * * * Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'So help me God' in our courtroom oaths'—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: 'God save the United States and this Honorable Court.' "

[5] *Committee for Public Education v. Nyquist,* 413 US 756, 773 (1973). *See also Lemon v. Kurtzman,* 403 US 602, 612-13 (1971). *Cf. Abington School Dist. v. Schempp,* 374 US 203, 222 (1963).

[6] *Cf. City of Portland v. Thornton,* 174 Or 508, 149 P2d 972 (1944). *Cf. Lowe v. City of Eugene, supra* note 2 at 546-48.

The plaintiffs in *Lowe v. City of Eugene, supra* note 2, alleged violations of the First and Fourteenth Amendments of the Constitution of the United States and of Art I, §§ 2, 3 and 5 of the Constitution of Oregon.

The First Amendment of the Constitution of the United States provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *."

The Fourteenth Amendment of that Constitution provides:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States * * *."

Article I, § 2 of the Constitution of Oregon provides:

> "All men shall be secure in the natural right to worship Almighty God according to the dictates of their own consciences."

Article I, § 3, of that Constitution provides:

> "No law shall in any case whatever control the free exercise, and enjoyment of religeous [sic] opinions, or interfere with the rights of conscience."

Article I, § 5 of that Constitution provides:

> "No money shall be drawn from the treasury for the benefit of any religeous [sic] or theological institution * * *."

[7] *See Weinberger v. Rall,* 265 Or 597, 600, 510 P2d 549 (1973), and cases cited therein.

[8] *Board of Education v. Allen,* 392 US 236, 242 (1968).

To the same effect, as stated in *Walz v. Tax Commission,* 397 US 664, 669 (1970):

> "* * * [T]here is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."

Also, as stated in *McCollum v. Board of Education,* 333 US 203, 256 (1948):

> "* * * Devotion to the great principle of religious liberty should not lead us into a rigid interpretation of the constitutional guarantee that conflicts with the accepted habits of our people."

2. *"Circumstances" at the time of Lowe.*

In considering the validity of the contention by defendants that there has been no "change in the circumstances" since *Lowe* sufficient to require that its decree be set aside, the "circumstances" at the time of *Lowe* must also be considered, together with the evaluation of those circumstances by this court in *Lowe* in reaching that decision, i.e., what circumstances were considered by it to be controlling.

The "circumstances" at the time of *Lowe* included the following:

(1) A large concrete cross was erected in city park by a private party without permission from the city;

(2) A building permit from the city was then sought and was issued by the city after a public hearing;

(3) No contention was made at that hearing that the cross was a "war memorial" and that contention was never considered or passed upon by the city council;

(4) That cross was "lighted" at Christmas and at Easter.

From the testimony in the trial of that case this court found that:

(1) The cross was a "religious symbol";

(2) The "chief purpose" of those who desired the display of the cross was "religious";

(3) The majority of people in the community at that time viewed its display with approval because it "reenforced their religious preference";

(4) The primary purpose of the city council in issuing the building permit was to conform to such desires by the majority; and

(5) The "war memorial argument" (which was not considered by the city council) was an "afterthought" in response to litigation.

This court in *Lowe* then held that the large concrete cross was a "religious symbol"; that its display during "Christmas festivals" was a "religious activity"; and that because the "chief purpose" of its display was "religious," the issuance by the city of a building permit to "set apart" public land for the display of such a "religious symbol" with such a "chief purpose" and as a "religious activity" was improper. In other words, the "purpose" test, as stated by the Supreme Court of the United States, was not satisfied. That holding was alone sufficient as a basis for the decision in *Lowe*.

Defendants, however, place great emphasis upon the fact that the majority in *Lowe* went further and said that "the mayor and council were responding to

public demand" and that the purpose of the First Amendment was to "prevent this very kind of response to majority pressure." In our judgment, that statement by the majority in *Lowe* was not necessary as a basis for its decision and did not provide an independent basis for that decision. Many laws which are held to be valid despite claims of unconstitutionality for violations of separation of church and state may initially have been sponsored by a "majority" and opposed by a "minority." The only proper basis for deciding the validity of such laws, however, is whether they satisfy the three-fold test of "purpose," "primary effect" and "entanglement." If they satisfy such a test, the fact that a "majority has imposed its views" on such a minority is, of itself, immaterial.

3. *Subsequent "changes in circumstances."*

In view of the basis for the decision of *Lowe* and the "circumstances" existing at that time, it is important to note the "circumstances" under which the cross was being displayed at the time of the trial in this case:

(1) Instead of being sponsored by a private party, as in 1964, the sponsorship for display of the cross in 1970 was the American Legion, a wholly secular organization;

(2) Instead of having a "religious purpose" as the "purpose" of those who desired the display of the cross in 1964, the purpose of the American Legion in 1970 was a secular purpose, i.e., the display of the cross as a memorial to all war veterans of all wars in which the United States has participated, to be known as the "Veteran's War Memorial Monument";

(3) Instead of seeking to authorize display of the cross by the obtaining of a building permit from a city council which never considered the purpose of the display to be as a war memorial, as in 1964, the authorization for its display was sought directly from the people of Eugene in 1970, and by a proposed charter amendment which specifically stated that the purpose of the display was to be as a war memorial;

(4) Instead of being displayed by being lighted only during the "religious festivals" of Christmas and Easter, as under the original proposal in 1964, that 1970 charter

amendment provided that the cross be lighted "on appropriate days or seasons which fittingly represent the patriotic * * * sacrifice of war veterans," including the national Holidays of Memorial Day, Independence Day, Veteran's Day, Thanksgiving and the Christmas season.

(5) Instead of being displayed on public property without designation as to its purpose, as in 1964, the 1970 charter amendment also provided that the American Legion, at its expense, prepare and affix to the cross a suitable "plaque * * * consistent with the intendments of this act";[9]

(6) It also appears that in 1970, pursuant to that charter amendment, an appropriate ceremony was conducted by the American Legion to dedicate the cross as the "Veteran's War Memorial Monument";

(7) Also pursuant to that amendment, memorial ceremonies have been subsequently conducted by the American Legion regularly at the site of the cross;

(8) Plans have also been made to place lettering on the crossbar of the cross reading:

"Bravely They Died, Honored They Rest."

Before considering the question whether a display of this cross on public property under these "changed circumstances" would satisfy the three-fold test of "purpose," "primary effect" and "entanglement" we believe that the problem as thus presented is placed in better perspective by first considering, based upon decisions by other courts involving displays of religious symbols on public property, what the holding of this court would be in the event that there had been no cross prior to the 1970 charter amendment and in the event that a new cross were proposed, constructed,

[9]That plaque reads as follows:

"VETERANS WAR MEMORIAL
MONUMENT
Dedicated July 4, 1970
IN MEMORIUM TO THOSE GALLANT
MEN AND WOMEN OF EUGENE
WHO FOUGHT AND DIED TO
KEEP OUR COUNTRY FREE
THIS PLAQUE PLACED HERE IN THEIR HONOR
BY AMERICAN LEGION EUGENE POST 3
AND WILLAMETTE WOMENS POST 161"

maintained and displayed in Eugene, or in any other city, under these "circumstances," as they existed at the time of the trial of this case.

4. *Decisions by other courts permitting displays of "religious symbols" on public property.*

In some eight other cases involving the display of "religious symbols" on public property, the courts, both state and federal, have held such displays to be constitutionally permissible, at least under facts similar to those presented by the "changed circumstances" in this case and in several instances under far weaker facts. Those cases are as follows:

(1) *Meyer v. Oklahoma City,* 496 P2d 789 (Okla 1972), cert denied, 409 US 980 (1972) (50-foot permanent Latin cross, sponsored by Council of Churches, on public fairgrounds and maintained at public expense);

(2) *Anderson v. Salt Lake City Corporation,* 475 F2d 29 (10th Cir 1973) (monument inscribed with Ten Commandments on courthouse grounds);

(3) *Paul v. Dade County,* 202 So 2d 833 (Dist Ct App Fla 3d Dist) cert denied, 207 So 2d 690 (Fla 1967), cert denied, 390 US 1041 (1968) (lights in shape of Latin cross on courthouse during Christmas season);

(4) *Allen v. Morton,* 495 F2d 65 (DC Cir 1973) (nativity scene in federal park adjacent White House during Christmas season);

(5) *Lawrence v. Buchmueller,* 40 Misc 2d 300, 243 NYS2d 87 (S Ct Westchester County 1963) (nativity scene on public school property);

(6) *Baer v. Kolmorgen,* 14 Misc 2d 1015, 181 NYS2d 230 (S Ct Westchester County 1958) (nativity scene on public school property);

(7) *Opinions of the Justices,* 108 NH 97, 228 A2d 161 (1967) (plaques with the words "In God We Trust" in public schoolrooms);

(8) *State ex rel Singlemann v. Morrison,* 57 So 2d 238 (La Ct App) cert denied, 57 So 2d 238 (1952) (statue of nun in public park).[10]

In addition, the courts have held that national

[10] *See also* Note, Suffolk U L Rev 815, 825 n 49 (1974), and *see* Sorauf, The Wall of Separation 253, 289, 364 (1976).

mottos such as "In God We Trust" and "One Nation Under God" need not be removed from coins and currency issued by the federal government[11] and the pledge of allegiance to the United States[12] or from the national anthem,[13] and that a stamp issued by the federal government with a picture of the Madonna was not improper.[14]

It is suggested that to the extent that reliance is placed by plaintiff upon these decisions by other courts it is necessarily contended by plaintiff that this court decided *Lowe* "incorrectly" and that this court should reverse the decision in *Lowe,* which cannot be done on a petition for review based upon "new matter," as in this case. This misstates plaintiff's position.

Although plaintiff may believe that *Lowe* was decided incorrectly, plaintiff's position neither depends upon nor requires a reversal of *Lowe*. *Lowe* was decided in the light of the circumstances then existing and the validity and controlling effect of that decision is limited to those circumstances. Thus, the decision in *Lowe* is not binding on this court in a case involving the display of a cross in the park of another Oregon city under different circumstances. Neither is *Lowe* binding on this court in a petition for review based upon "new matter" if a sufficient "change in the circumstances" is proved.

Again, the question to be decided is whether the present circumstances are sufficiently different than those existing in *Lowe* so as to require that the decree in *Lowe* be set aside. In deciding that question, the decisions by other courts under similar, or even weaker, circumstances would appear to be at least persuasive, although not controlling.

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[11] *Aronow v. United States*, 432 F2d 242 (9th Cir 1970).

[12] *Smith v. Denny*, 280 F Supp 651 (ED Calif 1968); *Lewis v. Allen*, 11 App Div 2d 447, 207 NYS2d 862 (3d Dept 1960), aff'd memo, 14 NY2d 867, 200 NE2d 767, 252 NYS2d 80, cert denied, 379 US 923 (1964).

[13] *Sheldon v. Fannin*, 221 F Supp 766 (D Ariz 1963).

[14] *Protestants and Other Amer. Unit. for Sep. of Ch. & St. v. O'Brien*, 272 F Supp 712 (D DC 1967).

5. *Application to present "circumstances" of test of "purpose," "primary effect," and "entanglement."*

Upon application to the present "circumstances" of the test of "purpose," "primary effect," and "entanglement" as stated by the Supreme Court of the United States,[15] we believe it to be clear that the display of a large cross in a public park as a veteran's war memorial under such circumstances does not violate constitutional requirements despite the fact that it is admittedly a religious symbol.

(1) *"Purpose."*

Conceding that a large Latin cross is a religious symbol, it has been uniformly held that in determining the validity of the display of either a cross or a nativity scene on public property, the controlling question is not whether such a cross or nativity scene is a religious symbol, but whether the purpose of its display is religious or secular. Thus, the requirement of "purpose" is satisfied by displays of nativity scenes on public property in connection with the Christmas season as a secular festival or pageant.[16] Indeed, permanent displays of crosses and other religious monuments on public property have been uniformly held valid (except in *Lowe*) even when displayed in connection with a secular festival or event.[17]

Accordingly, we hold that when the American Legion sponsors the display of a cross in a city park as a memorial to war veterans, and when a city accepts such a cross as a war memorial, the requirement of a secular purpose is satisfied.

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[15] See cases cited above, note 5, *supra*.

[16] *See Allen v. Morton*, 495 F2d 65 (DC Cir 1973); *Paul v. Dade County*, 202 So 2d 833 (Dist Ct App Fla 3d Dist), cert denied, 207 So 2d 690 (Fla 1967), cert denied, 390 US 1041 (1968); *Lawrence v. Buchmueller*, 40 Misc 2d 300, 243 NYS2d 87 (S Ct Westchester County 1963); and *Baer v. Kolmorgen*, 14 Misc 2d 1015, 181 NYS2d 230 (S Ct Westchester County 1958).

[17] *See Meyer v. Oklahoma City*, 496 P2d 789 (Okla 1972), cert denied, 409 US 980 (1972); *Anderson v. Salt Lake City Corporation*, 475 F2d 29 (10th Cir 1973); *Opinions of the Justices*, 108 NH 97, 228 A2d 161 (1967).

(2) *"Primary effect."*

In order to satisfy this test it is necessary that the display of the religious symbol have a "primary effect" that neither advances nor inhibits religion, as distinguished from an "incidental effect." All of the cases cited above hold that the display of a religious symbol such as a cross, nativity scene, or crucifix on public property does not have a "primary effect" to either advance or inhibit religion. This is particularly true when the display is sponsored by a secular organization and during secular holidays, festivals or pageants.[18] Thus, although compulsory prayers in a public school would be held to have such a "primary effect," the passive display of a religious symbol in a public school may not have such a "primary effect."[19]

In this case the display of this cross is not only sponsored by the American Legion (a secular organization) as a Veteran's War Memorial (a secular purpose), but the requirements of the charter amendment, as adopted by vote of the people of Eugene, are that it be lighted only on secular national holidays, but not including Easter (a religious day, not a national holiday), as in the past. The charter amendment, as adopted by the people, also requires that the secular purpose of the display be made clear by an appropriate plaque, which has since been attached to the cross. In addition, the cross has been dedicated as a Veteran's War Memorial by appropriate public ceremonies sponsored by the American Legion and memorial services have subsequently been conducted regularly by it at that site.

We do not overlook defendants' contention that this is a large permanent cross on a butte overlooking the

[18] See cases cited above, notes 16 and 17, *supra*.

[19] *See Opinion of the Justices*, 108 NH 97, 228 A2d 161 (1967), and *Lawrence v. Buchmueller*, 40 Misc 2d 300, 243 NYS2d 87 (S Ct Westchester County 1963). *Cf. Chamberlin v. Dade County Bd. of Public Instruction*, 143 So 2d 21 (Fla 1962), vacated, 374 US 487, original opinion adhered to, 160 So 2d 97, rev'd in part and remanded, 377 US 402, reh denied, 379 US 871, aff'd in part, rev'd in part, 171 So 2d 535 (1965).

City of Eugene and is lighted on national holidays. We also do not overlook the testimony offered by defendants to the effect that many people in Eugene regarded this cross as "an essentially religious symbol" both before and after the charter amendment; that this cross is "offensive" to some non-Christians and that it is also "offensive" to some Christians as a "misuse" of a religious symbol.

Neither do we overlook testimony offered by plaintiff that there are many large monuments with crosses in military cemeteries, in addition to the use of crosses as individual grave markers, and that a monument with a cross is an appropriate symbol of sacrifice by men who gave their lives for their country in time of war.

We understand and respect these contentions and conflicting points of view. The issue in this case, however, is not whether this cross is a "religious symbol" or a symbol of "sacrifice," whether its display is permanent and prominent, or whether its display is "offensive," but whether the display of this cross has "a primary effect that neither advances nor inhibits religion." In deciding that issue it is our duty to consider all of the circumstances, including this testimony and these facts, and to strike what we consider to be a proper balance.

After considering all of these circumstances we hold, in accordance with what we believe to be decisions by other courts, that the display of this cross in a city park as a war memorial under these circumstances does not have a "primary effect" which either "advances" or "inhibits" religion.

(3) *"Entanglements."*

In order to satisfy this test, which is a comparatively new test, the display of the religious symbol on public property must involve no "excessive government entanglement." As held in *Allen v. Morton*, 495 F2d 65 (DC Cir 1973), the most recent and authoritative decision on this subject, this requirement is not

violated by the fact of payment by the government for maintenance of the display of a religious "symbol," although the requirement is violated if the government participates in an active manner in the planning and organization of activities which involve such a display. Because there is no evidence of such participation by the City of Eugene in connection with the planning or organization of any activities which involve the display of this cross, we hold that the fact that the cross is to be owned and maintained by the city is not alone sufficient to violate the test of "excessive government entanglement."

For all of these reasons, we hold that the display of this cross as a "Veteran's War Memorial" under the "circumstances" now existing conforms with the three-fold test established by the United States Supreme Court for application in determining whether the "Establishment Clause" of the Constitution of the United States has been violated. As previously stated, we also adopt this same test for the purpose of determining whether similar provisions of the Oregon Constitution have been violated.

6. *Defendants' contention that the charter amendment could not change the cross as a religious symbol or "undo" the history of this cross.*

Defendants would dismiss these "changed circumstances" and escape the effect of these decisions by other courts by contending that the charter amendment could not "change" the religious symbolism of the cross or "undo" the history of this particular case and that, according to testimony offered by defendants, many people in Eugene not only regarded this cross as a religious symbol at the time of *Lowe* and before the charter amendment, but continue to regard it as "essentially a religious symbol."

We believe this contention to be unsound for the following reasons:

(1) It is true that the "changed circumstances" have not changed this cross as a "religious symbol." That

much is conceded. That fact is not decisive of the case, however, because the issue is not whether the cross was, and still is, a religious symbol, but whether its *display on public property* is unconstitutional.

(2) Also, the question to be decided is not whether the display of the cross under the circumstances existing *at the time of Lowe* was unconstitutional, but whether the display of the cross at this time and under the "circumstances" now existing is unconstitutional.

(3) The contention that the changed circumstances cannot "change" the symbolism of the cross, or "undo" the history of this particular cross, would "prove too much" because if literally applied, and as applied by the defendants, it would mean that the passive display on public property of any religious symbol would be unconstitutional, so as to require its removal, if it can be shown that it is commonly regarded as a "religious symbol" and that at the inception of its display the constitutional test of "purpose," "primary effect" and "entanglement" was not fully satisfied. If this contention is correct, such a "history" would forever foreclose anything that could ever be done thereafter, by change of circumstances or otherwise, even though sufficient to otherwise fully satisfy these constitutional requirements. This would include not only monuments and war memorials in cemeteries and parks, but the display of any religious inscription on any public building or other property.

(4) More specifically, the decision by the United States Court of Appeals, District of Columbia Circuit, in *Allen v. Morton, supra,* the latest and most authoritative decision on this subject, deals with this problem. In *Allen v. Morton,* a life-size nativity scene was displayed as a "creche" in a federal park adjacent to the White House during the Christmas season as a part of the Christmas "Pageant of Peace." It was clearly a "religious symbol." Washington Christian clergy were represented in the original organization of the pageant through the Archbishop of Washington

and the Washington Federation of Churches. Officials representing the U.S. Park Service also served on the executive committee for the pageant. Government sponsorship of the pageant also appeared in written programs and in "plaques." These facts were all part and parcel of the "history" of the origin of the display of this nativity scene in a public park, as well as of the display itself over a course of several years.

Although disapproving the active sponsorship of and participation by the government in the display of this "religious symbol" in a public park, the court in *Allen v. Morton* did not hold, as contended by the defendants in this case, that because of that "history" the display must be permanently discontinued and that the effect of that "history" was so pervasive that the constitutional deficiencies could never be cured.

On the contrary, it was held in *Allen v. Morton, supra* (at 75), that such a result was not "constitutionally required" and that these deficiencies could be "cured" for the purposes of future displays of that religious symbol by new regulations which would limit the "involvement" or "participation" by government by forbidding the government from participation in the sponsorship and conduct of the display so as to assure "neutral principles and criteria" that are "nondiscriminatory," accompanied by "appropriate plaques" to the same effect.

In reaching this conclusion the court applied the threefold test of "purpose," "primary effect," and "entanglement" and held that such a test was satisfied with the adoption of the newly required regulations and plaque.[20] In the course of reaching that conclusion the court held in *Allen v. Morton, supra* (at 69-70), that although the creche was "obviously a religious symbol" it was not used "to promote or profane any religion," but was "intended to be reverential to the religious heritage aspect of Christmas"; and (at 70-74) that upon application of the "balancing test," it

[20] For discussion of this decision see Note, 62 Georgetown LJ 1461 (1974), and Note, 8 Suffolk U L Rev, note 13, *supra*.

appeared that the display of the creche did not have a "primary effect" to "advance" or "inhibit" religion, but that its display "can have no more than a 'remote and incidental' effect advantageous to religious institutions." The court also held (at 74-76) that there would be no "excessive entanglement" by the government under the proposed new regulations, which assured "neutrality" by the government.

For all of these reasons, it is our opinion that under the "changed circumstances" in this case the present display of this cross, although admittedly a "religious symbol," is not unconstitutional because the present purpose of the display is secular; any "effect" to "advance" or "inhibit" religion is not "primary," but is no more than "remote and incidental," and, under the restrictions imposed by the charter amendment, there is no "excessive entanglement" by the City of Eugene.

Accordingly, we hold that the decree of the trial court in this case and the decision by the Court of Appeals affirming that decree must be reversed and that the decree as previously entered in *Lowe* must be set aside.

Reversed.

DENECKE, C. J., dissenting.

I dissent for the reason that a majority of this court, rightly or wrongly, decided in 1969 that this same cross had to be removed. In my opinion, nothing has happended subsequently which affords any logical basis to set aside that decision, and the law is clear and settled that parties are not permitted to relitigate matters that have already been decided although the personnel of the court which previously decided the issue has changed.

This is a suit in equity pursuant to ORS 16.460(1) to set aside the decree in *Lowe v. City of Eugene,* 254 Or 518, 451 P2d 117, 459 P2d 222, 463 P2d 360 (1969), cert den 397 US 1042, 90 S Ct 1366, 25 L Ed2d 654,

rehr den 398 US 944, 90 S Ct 1838, 26 L Ed2d 283 (1970).

The suit cannot be maintained upon the ground that this court erred in deciding the *Lowe* case.[1]

> "It has already been intimated that neither an erroneous conclusion upon which a judgment was based, nor any irregularity of proceeding not involving the jurisdiction of the tribunal pronouncing it, can have any effect in determing the question whether the judgment should be set aside or restrained in equity. Such, beyond doubt, is the law. 'A court of equity will never set aside or enjoin a judgment on the ground of error or mistake in the judgment of the court of law.' * * * for it is universally conceded that a court of equity will not interfere on the ground that in its decision the court of law or other judicial tribunal whose judgment is sought to be enjoined, commited error, whether of law or of fact." 3 Freeman, Judgments (5th ed) 2526-2527, § 1216.

A Comment to § 112, ch 5 of the Restatement of Judgments dealing with equitable relief from judgments states the policy underlying the quoted statement:

> "Where a fair opportunity has been afforded to the parties to an action to litigate a claim in a court which has jurisdiction over them and over the cause of action and the court has finally decided the controversy, the interests of the State and of the parties require that the validity of the claim and any issue actually litigated in the action shall not again be litigated by them * * *." Restatement 532, Judgments § 112.

In 1969 this court by a vote of four to three, with one of the majority being a pro tempore Justice, reversed the trial court and held that the cross need not be removed. A petition for rehearing was granted. The seven regular members of the court sat on the rehearing and the former Justice pro tem did not. Five of the regular members of the court held the cross had to be removed. Two regular Justices dissented. With

[1] I dissented from the majority decision in *Lowe* however, I am of the opinion that the correctness of that majority decision cannot be questioned in this case.

an opinion, the majority of five denied a petition for rehearing. The United States Supreme Court denied a petition for a writ of certiorari and appeal and a petition for rehearing. *Lowe v. City of Eugene*, supra (254 Or 518).

The majority of this court held in *Lowe v. City of Eugene*, supra (254 Or 518), that the City's permitting this particular cross to be erected and exhibited on City property was contrary to the first amendment to the Federal Constitution and several sections of Article I of the Oregon Constitution. The majority held that in the context of the erection and exhibition of this particular cross it was a religious symbol and the City's action in authorizing it to remain fostered the establishment of the Christian religion.

The holding in *Lowe* was based primarily on two considerations: (1) the essentially religious nature of the symbolism of the cross in our society, and (2) the connotations of government sponsorship of the Christian religion which resulted from the circumstances under which the City of Eugene approved the erection of this particular cross in its present location. The following excerpts illustrate the facts and considerations which were persuasive to a majority of the court:

> "* * * Their statements [witnesses before the City Council] reflected the popular sentiment at the time and place, and furnished ample proof, if any were needed, that the chief purpose of the display was religious. There is no doubt, from the record, that the mayor and council were responding to popular demand. It was to prevent this very kind of response to majority pressure, however, that the establishment clause of the First Amendment was written into our federal constitution." 254 Or at 533.
>
> "The principal purpose which motivated the city council was its desire to conform to the desires of a majority of the citizens of the community, who conscientiously believed that their preferred religious symbol was entitled to preferential public display simply because the majority wished it so. Such a response to majority religious pressure is, of course, exactly what

specific guarantees of rights in the state and federal constitutions were designed to prevent.

"* * * * *.

"Public land cannot be set apart for the permanent display of an essentially religious symbol when the display connotes government sponsorship. The employment of publicly owned and publicly maintained property for a highly visible display of the character of the cross in this case necessarily permits an inference of official endorsement of the general religious beliefs which underlie the symbol. * * *." 254 Or at 544.

The majority states the issue in this case: "* * * whether the *display* of the cross on city-owned property under the circumstances existing at the time of the trial of this case, as compared with its display at the time of *Lowe* under the circumstances then existing, satisfies or fails to satisfy the test established by the Supreme Court of the United States for application in such cases."

I am of the opinion, however, that the issue is not whether the present display of the cross meets the appropriate constitutional tests, but whether, in light of the decision and reasoning in *Lowe,* the circumstances have changed so drastically as to justify setting that decision aside.

The only change in circumstances is the amendment to the City Charter and the action taken pursuant to it. The amendment merely authorizes the City to accept the the cross as a gift and designates it as a war memorial. It authorized an American Legion post to affix a suitable plaque to the cross and directed that the City light the cross on patriotic days.

The majority states that the significant changes wrought by the amendment are: (1) Now a Legion post, rather than a corporation, Eugene Sand & Gravel, Inc., is the sponsor of the cross; (2) Now the purpose of the Legion is to display it as a war memorial, whereas before the persons (which must refer to either the sponsor or the majority of the townspeople who persuaded the City Council to permit the cross to be retained) desired it to be displayed for a religious purpose; (3) Now the government, speaking through the vote of a majority of the people, authorized its display as a war memorial, whereas the City Council previously did not consider whether it was a war memorial; (4) Now the cross must be lighted on patriotic days and Christmas; before it was customarily lighted on Easter and Christmas (there is no prohibition in the ordinance about lighting it at Easter); (5) Now a plaque shall be affixed stating its purpose; before nothing indicated its purpose; (6) The Legion had a dedication ceremony and conducts regular memorial ceremonies; and (7) Plans have been made to put appropriate words of memorial on the cross.

In *Lowe* this court held, in essence, that the "primary effect" of the City's action in permitting the cross to remain in the park was to foster the Christian religion and the City's action amounted to "excessive government entanglement with religion." The majority now holds in this case that because of the changes listed above that effect and entanglement have been completely changed. I do not believe that the shield with which the Bill of Rights protects the minority is so thin or that a decree of this court can be so easily bypassed.

O'Connell and Holman, JJ., join in this dissent.

APPENDIX D
STATE OF OREGON

SUPREME COURT

EUGENE SAND & GRAVEL, INC., an Oregon corporation,	)	
Petitioner,	)	JUDGMENT AND MANDATE
and	)	
AMERICAN LEGION POST #3, DEPARTMENT OF OREGON, a nonprofit corporation of the State of Oregon, for and on behalf of all duly constituted and organized Veterans organizations with chapters of posts located within the City of Eugene,	)	Appeal from Lane County No. 99775 CA 4879 SC 24696 On Review from Court of Appeals
Petitioner,	)	
v.	)	
CITY OF EUGENE et al,	)	
Respondents.	)	

This cause having come on to be heard on petition for review from the Court of Appeals and having been duly submitted and considered, and petition for rehearing having been denied by this court on January 11, 1977, the court finds there is error as

alleged.

IT IS THEREFORE ORDERED AND ADJUDGED that the decision of the Court of Appeals is reversed and the cause remanded to said court for entry of an order in accordance herewith.

IT IS FURTHER ORDERED that petitioner Eugene Sand & Gravel recover from individual respondents costs and disbursements in this court in the amount of $20. and from City respondents costs and disbursements in this court in the amount of $20.

IT IS FURTHER ORDERED that petitioner American Legion Post #3 recover from individual respondents costs and disbursements in this court in the amount of $20. and from City respondents costs and disbursements in this court in the amount of $20.

ENTERED at Salem, Oregon, December

16, 1976.

ISSUED: January 28, 1977

APPENDIX E

ORDER DENYING REHEARING

State of Oregon
Supreme Court

January 11, 1977

Terence J. Hammons
Hammons, Phillips & Jensen
46 Irving Road
Eugene, OR 97404

Re: Eugene Sand & Gravel, Inc. v.
City of Eugene
SC 24696
CA 4879

Dear Mr. Hammons:

The Supreme Court has today denied the individual respondents' Petition for Rehearing in the above-entitled matter.

Very truly yours,

Marilyn Hartley
Calendar Clerk

mh

cc - William G. Wheatley
Leslie M. Swanson
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APPENDIX F

Argued January 6, reversed and remanded February 26, petition for rehearing allowed April 23, petition for reconsideration of rehearing denied with leave to renew May 15, reargued June 2, former opinion withdrawn; decree affirmed October 1, petition for rehearing denied December 19, 1969. Petition for writ of certiorari and appeal denied by United States Supreme Court April 20, petition for rehearing denied by United States Supreme Court June 1, 1970

LOWE ET AL, *Respondents*, v. CITY OF EUGENE ET AL, *Defendants*, EUGENE SAND & GRAVEL, INC., *Appellant*.

451 P.2d 117
459 P.2d 222
463 P.2d 360

Action by voters and taxpayers of city and members of various religious and nonreligious organizations for declaratory judgment determining constitutionality of erection of cross on city property. The Circuit Court, Lane County, William S. Fort, J., entered decree requiring removal of the cross and appeal was taken. The Supreme Court, Langtry, J., held that erection and maintenance of concrete Latin cross and granting of a building permit therefor a few days later all at no cost to city did not amount to a religious activity violative of State and Federal Constitutions.

Reversed and remanded.

Goodwin, McAllister and O'Connell, JJ., dissented.

Constitutional Law—Decision on constitutional or nonconstitutional issue

1. Although courts will decide a case on a nonconstitutional issue if a constitutional question can be avoided, rule is limited to situation where record in case presents some other and clear ground upon which court may rest its judgment.

Constitutional Law—Constitutional questions presented

2. Where issue of city authority to issue building permits for erection of concrete Latin cross on city property was stricken by the court on plaintiffs' motion, constitutional questions arising from issuance of permits could not be avoided.

Appeal and Error—Exhibits which should have been received will be considered by reviewing court

3. Exhibits offered by defendants, in suit challenging constitutionality of city's authorizing erection and maintenance of Latin

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cross on city property, indicating that the cross carries connotations not essentially religious in character, should have been received in evidence and would be considered by the reviewing court.

Constitutional Law—Erection and maintenance of cross at no cost to city did not amount to violation of State or Federal Constitutions

4. Erection and maintenance of concrete Latin cross and granting of a building permit therefor a few days later all at no cost to city did not amount to a religious activity in violation of State and Federal Constitutions. Const. art. 1, §§ 2, 3, 5; U.S.C.A. Const. Amends. 1, 14.

Municipal Corporations—Building and lighting permits revocable

5. Building and lighting permits permitting concrete Latin cross to remain on city property at no cost to the city was revocable.

See separation between church and state.

16 Am Jur 2d, Constitutional Law § 339; 96 L Ed 968, 97 L Ed 145, 6 L Ed 2d 1394.

CJS, Constitutional Law § 206.

IN BANC

Appeal from Circuit Court, Lane County.

WILLIAM S. FORT, Judge.

William G. Wheatley, Eugene, argued the cause for appellant. With him on the briefs were William E. Flinn, and Jaqua, Wheatley & Gardner, Eugene, and Warren Cameron, Special Counsel, Seattle, Washington.

James P. Harrang, Eugene, and *Leo Pfeffer*, New York, New York, argued the cause for respondents. With them on the brief was Barbara B. Aldave, Eugene.

Howard M. Feuerstein, Portland, filed a brief for American Civil Liberties Union of Oregon as amicus curiae.

Richard D. Curtis, and Hansen & Curtis, Eugene,

filed a brief for Leslie D. Erb et al, as citizens of the City of Eugene as amici curiae.

Before PERRY, Chief Justice, and MCALLISTER, SLOAN, O'CONNELL, GOODWIN, DENECKE and LANGTRY, Justices.

REVERSED AND REMANDED.

LANGTRY, J. (Pro Tempore).

The crest of Skinner's Butte overlooks the City of Eugene and is within the city limits. It was donated to the city and for many years it has been maintained as a public park. From the late 1930's until 1964 successive wooden crosses were erected in this park, one replacing another as they deteriorated. These crosses were usually lighted at the Christmas and Easter seasons. One of the early crosses was large and neon-lighted. Construction of the first cross was motivated, at least in part, by a secular organization of physically handicapped people who received pleasure from looking out at the lighted cross. On November 28, 1964, defendant Eugene Sand & Gravel, Inc., with the aid of defendants Hamilton Electric and J. F. Oldham & Son, Inc., erected a prestressed concrete tapered Latin cross 51 feet tall on the property. The cross was equipped with inset neon tubing to provide lighting for the cross at the Christmas and Easter seasons. The plaintiffs in this declaratory judgment suit seek removal of this cross upon constitutional grounds.

It appears that no permission had been obtained from the city for erection of the earlier crosses. The city did not, however, interfere with any of the crosses —all were erected and maintained by the Eugene Chamber of Commerce and various individuals and other organizations at no expense to the city. No

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permission was obtained from the city to erect the challenged cement cross. But on December 2, 1964, after the cross had been put up, a building permit and an electrical permit were applied for by Eugene Sand & Gravel and Hamilton Electric. On its application Eugene Sand & Gravel gave as its reason for erecting the cross the word "admiration." The applications were referred to the city council for approval and they became the subject of a highly publicized public hearing which was attended by an overflow crowd. At the conclusion of the hearing the council, by a 7 to 1 vote, issued the permits. The plaintiffs, who are voters and taxpayers of the city and members of various religious and nonreligious organizations, brought this declaratory judgment suit alleging violation of Art. I, §§ 2, 3, and 5 of the Oregon Constitution, and the First and Fourteenth Amendments to the U. S. Constitution. The city and the builders of the cross were named as defendants.

The defendant Eugene Sand & Gravel, Inc., in one of several affirmative answers, all of which were stricken by the court on plaintiffs' motion, asserted that the city has authority under its charter and the laws of Oregon to allow the erection and maintenance of the cross as a monument upon city park property. This defendant's amended answer, and answers by other defendants, joined issues solely upon the constitutional questions involved.

After an extensive trial, reported in an 883-page transcript, and thorough briefing of the case, the trial court handed down its written opinion in which it held that the cross is primarily a religious symbol and "only secondarily a memorial of or a monument to a vitally significant value system in the life and history of our nation and this community;" that the

charter of the city and the laws of Oregon do not specifically allow any private person to erect or maintain in the city park a permanent religious symbol; and that the city council or any private person has no authority to maintain the cross. These findings were in the formal findings of fact.

The court also found that the City of Eugene "did not authorize or consent to the erection of the cross." The court held as a legal conclusion that it could decide the case without reaching the constitutional questions. The basis of this conclusion was that the city had no specific authority under charter or statute to allow the cross in the park. The decree required removal of the cross.

The City of Eugene did not appeal from this decree, but Eugene Sand & Gravel, Inc., did appeal and relief has been stayed pending determination.

Eleven amici curiae, who are residents, voters, and taxpayers of the City of Eugene, joined the controversy when the city failed to appeal from the trial court decree. They have asserted that they represent the citizens of Eugene and they have filed a brief seeking reversal of the decree. The American Civil Liberties Union has filed a brief amicus curiae in support of plaintiffs' position.

1, 2. We think the trial court erred in holding that the constitutional questions could be avoided. The rationale of the trial court was that the city, either in its charter or state laws, had no specific authority to allow erection of a religious symbol in a city park. It is correct that if a constitutional question can be avoided by deciding a case on a non-constitutional issue courts will do so. *Elliott v. Oliver*, 22 Or 44, 29 P 1 (1892). But this rule is limited to a situation where the record in the case presents some other and

clear ground upon which the court may rest its judgment. 22 Or at 48. In the case at bar, the issue of city authority which defendants sought to raise in an affirmative answer was stricken by the court on plaintiffs' motion. The issues were then drawn solely on constitutional grounds in amended pleadings, and the record did not present the issue of the city authority. The constitutional questions must be decided.

These questions have been briefed and argued in depth by the contending parties and amici curiae in this appeal. The briefs present more than 650 citations of authority, texts, and statutes.

Two of the many precedents cited by counsel come close to being in point to the factual situation and law upon which this case must be decided. These are *State v. Morrison*, 57 So2d 238 (La 1952), cert. den., April 28, 1952; and *Paul v. Dade County*, 202 So2d 833 (Fla Ct App 1967), cert. den., Florida Supreme Court, 207 So2d 690, cert den., U. S. Supreme Court, 390 US 1041 (no opinion, Mr. Justice Douglas dissenting).

In *Morrison* a Catholic religious order presented to the City of New Orleans a statue of Mother Cabrini on which the following inscription appeared:

"'"St. Frances Xavier
Mother Cabrini
Erected August 25, 1949
By The Order Of The Alhambra
During Its 23rd Biennial Convention."'"

This statue was placed upon public park property at no cost to the city and the city's authority to allow its placement there was challenged in a suit by a lay member of a Protestant religious sect. The statue of Mother Cabrini showed her in religious habit, wear-

ing a cross. She had done part of her charitable and church work in New Orleans. The Louisiana appellate court held:

> "It cannot be questioned that a municipality may permit the erection of statues and memorials in public places, whether they be purely ornamental or include the idea of a memorial * * *." 57 So2d at 247.[5]

The appellate court in its opinion approved the trial court's finding that there was no federal constitutional question involved "* * * since the erection of the statue here complained of cannot be held to be the establishment of a religion * * *." Reference was made to the pertinent provisions of the Louisiana Constitution which are quite similar to those respecting freedom and establishment of religion in the Oregon Constitution. The court took judicial notice of the existence of the many kinds of statues and monuments on public property in Louisiana and across the country which are religious in character, and then held:

> "'The only restriction against the City is that it cannot discriminate. That any statue or monument might incidentally have some religious significance cannot be held violative of the constitutional prohibitions, unless it was designed and used as a public shrine or place of worship, or for the propagation of a religious belief; or was intended to hold some other religious group in public contempt and ridicule; or designed to cause religious strife and antagonisms.'" 57 So2d at 246.

[5] As early as 1874, the then Supreme Court of New York held that:

> "Statues of men, and in commemoration of great public events, are now considered as the legitimate belongings of public places * * *. Cities * * * give abundant proof that statues, ornamental temples, obelisks, pillars and columns, have long been considered legitimate objects of public approval and admiration, and they are neither to be hid in a corner, nor placed where they cannot be seen." Tompkins v. Hodgson, 2 Hun 146 (NY 1874).

To the same effect see Parsons v. Van Wyck, 56 App Div 329, 67 NYS 1054 (1900); Vale v. City of San Bernardino, 109 Cal App 102, 292 P 689 (1930); Brahan v. City of Meridian, 111 Miss 30, 71 So 170 (1916).

> "* * * [T]he use of park lands for buildings or purposes which are incidental to its use as a public park are generally sustained, where the city retains control of the premises * * *." Rhyne, Municipal Law 473, § 21-7.

The appeal in the second case, *Paul v. Dade County*, supra, which we consider to be more closely in point, was decided after the trial court in the case at bar made its decision and thus the trial judge did not have the benefit of its reasoning.[5]

The report of that case states that from 1955 to 1966 the Chamber of Commerce had erected a large cross consisting of lights on the side of the Dade County courthouse during the Christmas season. The county bore no part of the cost.

The practice of permitting the cross to be there was challenged by a non-Christian resident taxpayer.[6]

[5] The opinion of the trial court was rendered in this case on January 5, 1967. Paul v. Dade County, supra, was decided by the Florida Appellate Court on October 3, 1967, and certiorari was denied by the United States Supreme Court, 390 US 1041, on April 29, 1968. Appellant's brief indicates the pleadings of Paul v. Dade County and the trial court's decree therein were brought to the attention of the trial judge in the case at bar.

[6] The challenge was based upon the First Amendment to the United States Constitution, and upon Sections 5 and 6 of the Bill of Rights of the Florida Constitution. The latter sections are:

> "Section 5. The free exercise and enjoyment of religious profession and worship shall for-ever be allowed in this State * * * but the liberty of conscience hereby secured shall not be so construewed [sic] as to justify licentiousness or practices subversive of, or inconsistent with, the peace or moral safety of the State or society.
>
> "Sec. 6. No preference shall be given by law to any church, sect or mode of worship and no money shall ever be taken

(Continued on page 526

The county admitted that it allowed the "Latin" cross upon the building and that such a Latin cross could be used as a religious symbol. But it asserted that crosses also have secular connotations and that the Latin cross on the courthouse had a secular connotation as a "yule" season decoration.

The defendants in the case at bar have made contentions similar to those made by Dade County. In this regard we noted above that the trial court in the case at bar found the cross to be "primarily a religious symbol," and "secondarily a memorial of or monument to a vitally significant value system in the life and history of our nation and this community." With these findings we do not disagree.

(Continued from page 525)

from the public treasury directly or indirectly in aid of any church, sect or religious denomination or in aid of any sectarian institution."

The section of the Louisiana Constitution construed in State v. Morrison, supra, is:

"Section 4. Every person has the natural right to worship God according to the dictates of his own conscience. No law shall be passed respecting an establishment of religion, nor prohibiting the free exercise thereof; nor shall any preference ever be given to, nor any discrimination made against, any church, sect or creed of religion, or any form of religious faith or worship." LSA Constitution, Art. I, § 4.

The sections of Article I of the Oregon Constitution plaintiffs claim to be violated are:

"Section 2. All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences.

"Section 3. No law shall in any case whatever control the free exercise, and enjoyment of religeous (sic) opinions, or interfere with the rights of conscience.

"Section 5. No money shall be drawn from the Treasury for the benefit of any religeous (sic), or theological institution, nor shall any money be appropriated for the payment of any religeous (sic) services in either house of the Legislative Assembly."

In *Paul v. Dade County*, the court held:

"The applicable constitutional criterion, as we divine it, is that set forth by the United States Supreme Court in Abington Tp. School District v. Schempp, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963):

"'* * * The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. Everson v. Board of Education, [330 U.S. 1, 67 S. Ct. 504, 91 L.Ed. 711, 168 A.L.R. 1392, supra;] McGowan v. Maryland, supra, 366 U.S. [420] at 442, 81 S. Ct. [1101] at 1113-1114, 6 L.Ed.2d 393.' Id. at 374 U.S. 222, 83 S.Ct. 1571.

"It has also been observed that many symbols, though religious in origin, have ceased to have religious meanings *or have also acquired secular meanings*. See Abington Tp. School District v. Schempp, supra. For example, the dove, the star, the fish, and three interwined [sic] rings have all had, or presently may have, some religious symbolism attached thereto. On the other hand, some have also acquired certain secular meanings.

"The record does not indicate that this temporary string of lights forming a cross was used to support, aid, maintain or establish any religion or religious edifices. Its purpose was not to promote the participation by anyone in the affairs of any religious organizations or sect.

"Consequently, we hold that under the Schempp test, this does not amount to the establishment of a religion in violation of the First Amendment, and that it does not amount to a religious activity, controlled, supported or influenced by the govern-

ment as was found to exist in Engel v. Vitale, 370 U.S. 421, 82 S. Ct. 1261, 8 L.Ed.2d 601 (1962). See also: State ex rel. Singelmann v. Morrison, 1952 L.App., 57 So.2d 238." (Emphasis supplied.) 202 So2d at 835.

The Florida court referred to the lights as temporary in character; the cross in the case at bar is permanent in physical character. Obviously, however, a physically permanent structure such as this cross can be quickly removed. The *Dade County* cross was put up from 1955 to 1966, a total of twelve years. It was assuming the proportions of tradition, which suggests permanency. In this respect, the cross in the case at bar and the cross on the Dade County courthouse share the same characteristic.

3, 4. The trial court in the case at bar failed, apparently by oversight, to receive in evidence all of defendants' offered Exhibits 2 through 53. These exhibits, which we hold should have been received, are in the record and we are considering them. They indicate that many crosses and other religious symbols traditionally have been used as monuments and memorials upon public property throughout Oregon and the United States, without appellate court challenge except as noted in this opinion. This, in itself, is indicative of a feeling among a people who strongly support a constitutional government, that there is no constitutional question involved in such a case, or it is so minimal as not to merit notice. The evidence indicates that to many people the cross, whether it is a Latin cross or some other type, carries connotations that are not essentially religious in character and to such people it has primarily secular meanings. There is nothing in the evidence which reasonably supports an inference that the purpose of the defendants in erecting the cross

was to promote the participation by anyone in, or the advancement or inhibition of, any religious belief or organization, or that such was its primary effect. In *Dickman et al v. School Dist. 62C et al*, 232 Or 238, 247, 366 P2d 533 (1961), cert. den. 371 US 823, 83 S Ct 41, 9 L ed 2d 62 (1962), Mr. Justice O'CONNELL, speaking for this court, said:

"* * * A certain amount of interplay of influences exercised by state and church has been permitted. It is not difficult to cite examples. * * * [M]any * * * religious practices and connotations are found in the functioning of government, both state and federal."

We do not believe that the erection and maintenance of the cross in question amounts to a religious activity which violates the applicable provisions of the Oregon Constitution or the First and Fourteenth Amendments to the United States Constitution.

5. The official action of the City of Eugene in issuing the building and lighting permits for the cross a few days after it was erected, and after a widely publicized and well attended public hearing, constituted formal permission of the city for it to remain there at no cost to the city. Such a permit appears to be limited in that it is revocable in nature. 10 McQuillin, Municipal Corporations 183, § 28.53 (1966).

The conclusions of this opinion follow a study of the extensive evidence, assignments of error, answers, and arguments. Although not all of them have been mentioned in this opinion they have not been overlooked. The decree of the trial court is reversed and the case remanded for a decree to be entered consistent with this opinion.

DENECKE, J., specially concurring.

I concur in the majority decision that the constitutional issue must be decided and I further concur in the majority decision that neither the Constitution of Oregon nor the Constitution of the United States requires that the cross be removed. I believe I base my decision upon slightly different reasoning than that used by the majority.

I consider the problem as one arising under the "establishment clause" of the First Amendment, rather than under the "free exercise" clause. Therefore, I would pose the issue: Does the city foster the establishment of the Christian religion by permitting private persons to erect a cross in a city park and to light the cross during the Christmas and Easter season? In my opinion it does not.

In *Niemotko v. Maryland*, 340 US 268, 71 S Ct 325, 95 L Ed 267 (1951), the city Park Commissioner refused to give a Jehovah's Witnesses group a permit to hold Bible talks in a city park. The group held such a meeting without a permit and Niemotko, a member of the group, was arrested and later found guilty of disorderly conduct. The Court reviewed its early decisions and stated:

> "• • • In those cases this Court condemned statutes and ordinances which required that permits be obtained from local officials as a prerequisite to the use of public places, on the grounds that a license requirement constituted a prior restraint on freedom of speech, press and religion, and, in the absence of narrowly drawn, reasonable and definite standards for the officials to follow, must be invalid. • • •" 340 US at 271.

The Court found that the city had not given Niemotko a permit because the City Council disliked or disagreed

with the Witnesses' views. The conviction was reversed. The Court expressly rejected the argument, "that state and city officials should have the power to exclude religious groups, as such, from the use of the public parks." 340 US at 272.

Fowler v. Rhode Island, 345 US 67, 73 S Ct 526, 97 L Ed 828 (1953), similarly held Jehovah's Witnesses had a right to hold religious services in a city park where other religions were permitted to hold services. The holding rested upon the First and Fourteenth Amendments.

Both of these decisions concern the free exercise portion of the First Amendment; however, they accept without question the proposition that a city does not violate the establishment clause of the First Amendment by permitting religious groups to hold religious services in public parks. If a city can validly permit groups to hold religious services in parks, why can it not validly permit persons to erect a religious symbol, a cross, in a park?

The Establishment Clause prohibits the state, or any subdivision, from either aiding or appearing to aid the general cause of religion or any one religion. The appearance of fostering religion is to be prohibited as much as the actual fostering of religion: Both have a coercive effect.

Accepting the proposition that permitting religious services in a public park neither fosters nor appears to foster the establishment of religion, in my opinion issuing a revocable permit for the erection and the occasional lighting of a cross in a public park also does not foster or appear to foster the establishment of religion.

Whether the state action or permission appears to foster a religion is a question of degree. If the city had given a religious group a revocable permit to build a cathedral in the park, the appearance of city aid to religion would, in my opinion, be so strong as to require a decision that such permission was in aid of the establishment of religion and that, therefore, it was invalid. I do not believe permission to erect the Eugene cross falls into this category.

GOODWIN, J., dissenting.

As I understand the majority, the maintenance of the cross in a Eugene city park (a) is not a religious activity, or (b), if it is a religious activity, the city's participation in it is so insubstantial as to fall within the rule that the law does not notice trifles.

Much as I would like to join the majority and thus avoid an expression of disunity concerning this locally acrimonious confrontation between "procross" and "anticross" factions, the record compels me toward a different conclusion.

The display of the lighted cross during Christian festivals is at least concurrently a religious activity, even if one were to accept the somewhat labored argument of the proponents of the cross that the true motive for the display has been secular, i.e., the commercial exploitation of religious holidays. Indeed, the "procross" faction in this litigation has been embarrassed by its friends. Several witnesses innocently jeopardized the defense by references at the city council hearing to their religious reasons for wanting to keep the cross on display as a silent witness to their faith. Their statements reflected the popular sentiment at the time and place, and furnished ample proof, if any were needed, that the chief purpose of the display was religious. There is no doubt, from the record, that the mayor and council were responding to popular demand. It was to prevent this very kind of response to majority pressure, however, that the establishment clause of the First Amendment was written into our federal constitution. *Abington School Dist. v. Schempp*, 374 US 203, 83 S Ct 1560, 10 L Ed 2d 844 (1963).

Turning to our state constitution, and given the majority's acknowledgment that the cross display is that of a religious symbol, there is further reason to rebuke the city council. Government has no more right to place a public park at the disposal of the majority for a popular religious display than it would have, in response to a referendum vote, to put the lighted cross on the city hall steeple. The whole point of separation of church and state in a pluralistic society is to keep the majority from using its coercive power to obtain governmental aid for or against sectarian religious observances. See *Dickman et al v. School Dist. 62C et al*, 232 Or 238, 246-247, 366 P2d 533 (1961), cert. denied, 371 US 823 (1962).

Finally, I do not believe the difficult constitutional question is one that can be evaded by trivialization. The cross does not occupy a large tract of land, but it is permanent and it is conspicuous. Whether so intended by the city council or not, the city's participation in the display has placed the city officially and visibly on record in support of those who sought government sponsorship for their religious display.

For the foregoing reasons, I would affirm the judgment entered below.

McALLISTER and O'CONNELL, JJ., join in this dissenting opinion.

ON REHEARING

Action by voters and taxpayers of city and members of various religious and non-religious organizations for declaratory judgment determining constitutionality of city's issuance of building permits for erection of cross on city property. The Circuit Court, Lane County, William S. Fort, J., entered decree requiring removal of cross and appeal was taken. The Supreme Court, 451 P2d 117, reversed and remanded. On rehearing, the Supreme Court, Goodwin, J., held that issuance of permits amounted to a religious activity in violation of State and Federal Constitutions.

Formal opinion withdrawn; decree affirmed.

Denecke, J., and Perry, C.J., dissented.

Courts—Constitution of Supreme Court

6. Parties have the right to a decision by a lawfully constituted Supreme Court; however they do not have the right to a decision by a particular judge or group of judges.

Appeal and Error—Rehearing may be had anytime until time for rehearing has expired—Finality of decision prior thereto

7. Until time for rehearing has expired, party in whose favor decision is rendered has no vested right in the decision that would preclude its reexamination and vacation in the ordinary course of judicial administration.

Appeal and Error—Where majority of seven regular judges vote for rehearing it is properly granted

8. Regardless of whether Supreme Court judge absent at time case was decided or judge participating in his absence or both were qualified to vote on petition for rehearing, petition was properly granted where a qualified majority of the seven regular justices voted for rehearing.

Judges—Judge absent at time of decision voting on rehearing, and participating therein

9. Supreme Court justice who was absent at time original decision was rendered was not thereby disqualified from participating in and voting at rehearing.

Constitutional Law—Sponsorship by city of religious activity prohibited by Federal and State Constitutions

10. City's issuance of building permits for erection of neon lighted cross on city property amounted to sponsorship of a religious activity in violation of State and Federal Constitutions. Const. art. 1, §§ 2, 3, 5; U.S.C.A. Const. Amendments. 1, 14.

See concept of separation of church and state.

16 Am Jur 2d, Constitutional Law § 339; 96 L Ed 968, 97 L Ed 145, 6 L Ed 2d 1394.

CJS, Constitutional Law § 206.

IN BANC

Appeal from Circuit Court, Lane County.

WILLIAM S. FORT, Judge.

John E. Jaqua and *William G. Wheatley*, Eugene, argued the cause for appellant on rehearing. On the brief opposing rehearing was William G. Wheatley, Eugene.

Barbara B. Aldave, Eugene, and *Leo Pfeffer*, New York, New York, argued the cause for respondents on rehearing. With them on the petition for rehearing and brief was James B. Harrang, Eugene.

Warren Cameron, Seattle, Wash., and Richard D. Curtis and Hansen, Curtis & Strickland, Eugene, filed a brief for Leslie D. Erb et al, citizens of the City of Eugene, as amici curiae.

Before PERRY, Chief Justice, and MCALLISTER, SLOAN, O'CONNELL, GOODWIN, DENECKE and HOLMAN, Justices.

FORMER OPINION WITHDRAWN; DECREE AFFIRMED.

GOODWIN, J.

The trial court, in a suit for declaratory relief, ordered the City of Eugene and the other named defendants to remove from a public hilltop park a neon-lighted concrete cross some 50 feet tall which, when lit, was visible for several miles over a major part of the city of Eugene. On appeal, this court reversed the trial court's decree. The matter is before us again, on a petition for rehearing.

In a brief and upon oral argument, counsel challenged the propriety both of the granting of the rehearing and of the submission of the cause to a court that contained a justice who had not participated in the original decision.

On January 6, 1969, the original appeal was argued before a court consisting of Chief Justice PERRY and Justices MCALLISTER, SLOAN, O'CONNELL, GOODWIN, DENECKE and LANGTRY. In the absence of Justice HOLMAN, a regular member of the court, Justice LANGTRY was sitting as a Justice pro tempore duly assigned to this court pursuant to ORS 2.052.

The court handed down its original opinion on February 26, 1969, reversing the trial court. Justices PERRY, SLOAN, DENECKE and LANGTRY voted for reversal. Justices MCALLISTER, O'CONNELL and GOODWIN dissented. *Lowe v. City of Eugene*, 254 Or 518, 451 P2d 117 (1969).

The plaintiffs filed a petition for rehearing. On April 22, 1969, the court in its regular weekly conference considered the petition. Four of the regular justices who had participated in the original decision favored granting the petition. The other two regular justices and Justice LANGTRY opposed granting the petition. Since four of the regular justices who had participated in the original decision voted for a rehearing, it was unnecessary to decide whether Justice HOLMAN or Justice LANGTRY or neither of them or both of them should vote on the petition. The petition was granted.

The rehearing was set for June 2, 1969. On that date the cause was argued before the seven regular justices of the Supreme Court, none then being absent or disqualified. The court was thus convened according to the practice followed when a case is reargued in banc and no regular justice is disqualified. Justice LANGTRY had been appointed to serve for ninety days beginning the first judicial day in January, and his term had expired before June 2, 1969.

The submission of the cause on rehearing to the seven regular justices, including Justice HOLMAN, was correct.

The question whether a justice who did not participate in an original decision is barred from subsequent consideration of that case is potentially troublesome in any jurisdiction which allows rehearings. There are numerous reasons other than that of disqualification for a particular justice to be absent from a particular argument. Moreover, if the reason for the original absence was temporary, it is likely that the absent justice will be available for duty when the case is argued on rehearing.

Two lines of precedent in the United States deal with this situation.

In some jurisdictions a regularly elected justice who, for any reason, does not participate in an original decision does not participate in any subsequent considerations of that case. The reasons for the rule are set out in *Gas Products Co. v. Rankin*, 63 Mont 372, 207 P 993, 24 ALR 294 (1922); *Flaska v. State*, 51 NM 13, 177 P2d 174 (1946); *Cordner v. Cordner*, 91 Utah 474, 64 P2d 828 (1937); *Rohlfing v. Moses Akiona, Ltd.*, 45 Hawaii 440, 369 P2d 114 (1963); but cf. *Yoshizaki v. Hilo Hospital*, 50 Hawaii 40, 429 P2d 829 (1967).

In California, the court as it is constituted on the day a case is argued on rehearing is the Supreme Court for the purpose of the vote on the questions argued. A regularly elected justice who is present for duty and not disqualified hears argument and participates in the vote. See *Metropolitan Water Dist. v. Adams*, 19 Cal 2d 463, 122 P2d 257 (1942). Accord, *Glasser v. Essaness Theatres Corp.*, 346 Ill App 72,

89-100, 104 NE2d 510 (1952); *Battle v. Mason*, 293 P2d 324, 333-334 (Okla 1955).

We believe that the better reasoned cases are those which follow the California rule.

The institution of rehearing was invented and has survived because it is beneficial to the administration of justice. This court permits any party to file a petition for rehearing within 20 days following the publication of our opinion announcing a decision. Oregon Supreme Court Rule 47.

Every petition is carefully considered by the court. On any given date the court may be made up of seven justices who may not be the same seven who constituted the court the day, the week, or the month before. This change in the court's composition may be the result of many factors: e.g., illness, retirement, election. The court nonetheless votes and makes decisions as a court, not as a collection of individual justices.

6, 7. Both initially and upon rehearing, the parties have the right to a decision by a lawfully constituted court. They do not have a right to a decision by a particular judge or group of judges. In the case at bar, no decree has yet been placed beyond the power of this court to recall, modify or reverse; the cause is still pending. Until the time for rehearing has expired, the party in whose favor a decision is rendered has no vested right in the decision that would preclude its re-examination and vacation in the ordinary course of judicial administration. *Metropolitan Water Dist. v. Adams*, 19 Cal 2d at 475.

When the court, on June 2, 1969, heard argument on rehearing, Justice HOLMAN was present for duty, was not disqualified, and had both the right and the duty to vote on the merits of the case.

8, 9. We hold, therefore: (1) that regardless of the number of justices available and qualified to vote, the petition for rehearing in this case was properly granted by a majority vote of a lawfully constituted court; (2) when the case came on in due course for argument on rehearing it was heard before a lawfully constituted court.

10. The majority of the court before which the case was argued on June 2, 1969, is of the opinion that the decree of the trial court should be affirmed for the reasons substantially as set forth in the dissenting opinion handed down on February 26, 1969. The former majority opinion handed down on February 26, 1969, is accordingly withdrawn. The decree entered below is affirmed. Neither party shall have costs in this court.

DENECKE, J., dissenting.

I concur in that part of the majority opinion approving the granting of the petition for rehearing and the procedure on rehearing. Upon the constitutional issue, however, I dissent for the reasons stated in my specially concurring opinion filed with our former decision.

PERRY, C. J., joins in this dissent.

ON PETITION FOR REHEARING

Action by voters and taxpayers of city and members of various religious and non-religious organizations for declaratory judgment determining constitutionality of city's issuance of building permits for erection of cross on city property. The Circuit Court, Lane County, William S. Fort, J., entered decree requiring removal of the cross, and appeal was taken. The Supreme Court, 451 P.2d 117, reversed and remanded. On rehearing, the Supreme Court, 459 P.2d 222, withdrew its former opinion and affirmed the decree of the Circuit Court. On further rehearing, the Supreme Court, Goodwin, J., held that alleged purpose of city in allowing erection

of cross to enhance commercial exploitation of principal Christian holidays would not support the city's action, where principal purpose was desire to conform to desires of majority of citizens, who believed that their preferred religious symbol was entitled to preferential public display.

Petition for rehearing denied.

Denecke, J., and Perry, C.J., dissented.

Constitutional Law—Governmental act offending constitutional prohibition on establishment of religion

11. Act of city in turning over to private parties city-maintained public land on which cross was erected, embedded in concrete, was governmental act, offending constitutional prohibitions with respect to establishment of religion. U.S.C.A.Const. Amend. 1; Const. art. 1, § 5.

Constitutional Law—Erection of cross in secular park

12. That public park in which cross was erected was dedicated to secular purpose would not support assumption that principally secular purpose motivated city's approval of erection of cross.

Constitutional Law—Commercial exploitation vs. preferential religious symbol display

13. Action of city in permitting erection of lighted cross in city park was not rendered constitutionally valid by alleged purpose of enhancing commercial exploitation of Christian holidays, where principal purpose which motivated city council was to conform to desires of majority of the citizens of the community, who believed that their preferred religious symbol was entitled to preferential public display. U.S.C.A.Const. Amend. 1; Const. art. 1, § 5.

Constitutional Law—Religious display connoting government sponsorship

14. Public land cannot be set aside for permanent display of essentially religious symbol when the display connotes government sponsorship. U.S.C.A.Const. Amend. 1; Const. art. 1, § 5.

Constitutional Law—Government not to aid or oppose any religion

15. Government may foster education in history and cultural contributions of religions generally, and may add to protect individual's right to his own personal expressions of religious opinion, but may not place its power, prestige, or property at disposal of private persons or groups either to aid or oppose any religion. U.S.C.A.Const. Amend. 1; Const. art. 1, § 5.

Constitutional Law—State Constitution does not permit state to sponsor particular religion

16. State Constitution was not intended to permit the state to sponsor any particular religion. Const. art. 1, § 5.

See Religious freedom, and concept of separation of church and state.

16 Am Jur 2d, Constitutional Law § 339; 96 L Ed 953, 97 L Ed 145, 6 L Ed 2d 1394.

CJS Constitutional Law § 206.

IN BANC

Appeal from Circuit Court, Lane County.

WILLIAM S. FORT, Judge.

On appellant's petition for rehearing filed November 28, 1969.

William G. Wheatley, and Jaqua, Wheatley & Gardner, Eugene, and Warren Cameron, Olympia, Washington, for the petition.

REHEARING DENIED.

GOODWIN, J.

In an action for a declaratory judgment determining the constitutionality of the issuance by the City of Eugene of building permits for the erection of a cross on city-park property, the circuit court for Lane County entered a decree requiring removal of the cross. An appeal to this court was argued January 6, 1969; on February 26, 1969, this court reversed and remanded, with three judges dissenting. A petition for rehearing, filed April 22, 1969, was allowed, and the cause was argued on rehearing June 2, 1969. On October 1, 1969, this court, with two judges dissenting, withdrew its earlier majority opinion and affirmed the trial court by adopting in substance the previous dissent as the opinion of the court.

In a new petition for rehearing, the parties who

prevailed in the original opinion have listed a number of objections to the decision on rehearing. In granting the first rehearing and withdrawing the majority opinion of February 26, 1969, this court did not write a new opinion dealing point by point with the various arguments which had been discussed in the earlier majority and dissenting opinions. Perhaps this economy of words has misled the petitioners. It cannot be fairly asserted, however, that this litigation has suffered at any stage from inadequate debate or want of deliberation. Nonetheless, the new petition asserts that "newly discovered material matter" should be considered, and that new legal arguments are relevant to the proper disposition of the case and should be heard in a third oral argument.

The petition challenges our disposition of this case on three principal grounds: an alleged mistake as to the facts, an alleged misreading of the federal cases which have construed the First Amendment to the United States Constitution,[1] and an alleged misreading of the Oregon Constitution, Art I, §§ 2, 3, 4, 5, and 6.

11. First, as to the factual record, the petition is not well taken. The petition asserts that the only governmental act in support of the erection of the cross by private parties was the issuance of building and electrical wiring permits. This assertion overlooks the important fact that the city also turned over to private parties the city-maintained public land in which the cross was imbedded in concrete so that it would last,

[1] United States Constitution, Amendment 1:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

as one of the defendants testified, "forever." Other charges of factual inaccuracy in the opinion are equally unsupported by the record.

12. Turning to another argument urged in the petition, the proponents of the display seek to reopen the case for the purpose of introducing evidence that the public park atop Skinner's Butte in Eugene is a "War Memorial Park" and therefore is a fit site for a lighted cross regardless of reasons which might militate against such a display on other types of public lands or buildings. The petitioners' argument seems to be that because the park was dedicated to a secular purpose it must be assumed that a principally secular purpose motivated the city's participation in the display of the cross. This argument was made in the original trial, and all the evidence the petitioners now seek to have reconsidered was in the record which we examined when the case was first before us. The trial court decided that the secular purpose of the park dedication had no relevance to the city council's action then under review. We agree.

13. The war-memorial argument was never passed upon by the city council. The city's action in this case was taken, and defended during the trial below, primarily as an action taken by the city in response to the political power of the majority of the townspeople. At the trial, the city argued that the city council intended to aid the business community, some of whose members expressed a desire to display the cross in order to enhance the commercial exploitation of the principal Christian holidays: Christmas and Easter. The city's evidence tended to support this theory. At the same time, the record shows, a majority of the people in the community apparently viewed the display with approval because it reinforced their religi-

ous preference. These religious views also had been brought to bear upon the city government.

A majority of this court was of the opinion in October, and remains of the opinion now, that the allegedly commercial purposes behind the erection of the cross were, like the war-memorial argument, largely afterthoughts which were developed and embellished in response to this litigation.

The principal purpose which motivated the city council was its desire to conform to the desires of a majority of the citizens of the community, who conscientiously believed that their preferred religious symbol was entitled to preferential public display simply because the majority wished it so. Such a response to majority religious pressure is, of course, exactly what specific guarantees of rights in the state and federal constitutions were designed to prevent.

If the hilltop in question were private property, the petitioners and their supporters would be constitutionally entitled to erect their cross under the free-exercise clause of the First Amendment. However, the land is public, and its custodian is a governmental subdivision. This is the decisive factor.

14, 15. Public land cannot be set apart for the permanent display of an essentially religious symbol when the display connotes government sponsorship. The employment of publicly owned and publicly maintained property for a highly visible display of the character of the cross in this case necessarily permits an inference of official endorsement of the general religious beliefs which underlie that symbol. Accordingly, persons who do not share those beliefs may feel that their own beliefs are stigmatized or officially deemed less worthy than those awarded the appearance of the city's endorsement. While government can foster education in the history and cultural contributions of religions generally, and can act to protect the individual's right to his own personal expressions of religious opinion, the government has no business placing its power, prestige, or property at the disposal of private persons or groups either to aid or oppose any religion. *Epperson v. Arkansas*, 393 US 97, 89 S Ct 266, 21 L Ed 2d 228 (1968); *Abington School Dist. v. Schempp*, 374 US 203, 222-223, 83 S Ct 1560, 10 L Ed 2d 844 (1963); *Engel v. Vitale*, 370 US 421, 82 S Ct 1261, 8 L Ed 2d 601, 86 ALR2d 1285 (1962); *McCollum v. Board of Education*, 333 US 203, 68 S Ct 461, 92 L Ed 649, 2 ALR2d 1338 (1948).

It is, of course, far too late in the evolution of our federal constitution for the petitioners to overlook the protection which the religion clauses of the First Amendment give to nonreligious citizens and to citizens whose religious beliefs differ from those of the majority. *Torcaso v. Watkins*, 367 US 488, 81 S Ct 1680, 6 L Ed 2d 982 (1961). As it was expressed by Mr. Justice Jackson in *Board of Education v. Barnette*, 319 US 624, 642, 63 S Ct 1178, 87 L Ed 1628 (1943):

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or for citizens to confess by word or act their faith therein • • •."

The present situation is easily distinguished from the public cemetery in which private persons are allowed to designate whether small crosses shall be placed over the graves of their relatives. In the case of the public cemetery, the presence of the individual cross is clearly a matter of individual preference. It

can be judicially noted that graves of non-Christians are not usually marked with Christian crosses.

Monuments to religiously motivated persons who become famous are also distinguishable from the type of display found in the case at bar. Statutes of noted religious persons are generally recognized as tributes to the individuals rather than to the religions for which they labored. Religion is, after all, a part of history. Consequently, a public monument to a famous American preacher or to a saint recognized by a church would perhaps be permissible, whereas a public monument depicting a biblical character or religious symbol would tend to sponsor the religion rather than to honor a famous person. In the case at bar, a large Latin cross which is lighted primarily during the Christmas season and Easter week is much more a testimonial to a religious faith than to a person. Those who argue that the cross is a mere secular symbol ignore 2,000 years of history.

Religious freedom and majority rule must live side by side. The majority, no matter how pure its intentions, has no right under our system of government to exert its political muscle to gain a preferred place for its testimony to its religious beliefs.

Lastly, the petition asserts that the majority of this court in adopting in substance the views expressed in the dissenting opinion filed on February 26, 1969, has misread the Oregon Constitution. The petition points out, as "newly discovered matter," the obvious fact that the Oregon Constitution contains no specific language duplicating the so-called Establishment Clause of the First Amendment to the United States Constitution.

The petition cites evidence available in the 1857 records of Oregon's constitutional debates that the

Bill of Rights of the Indiana State Constitution was used as a model for the Oregon Bill of Rights. Indiana's constitution contains an establishment, or "credal preference" clause.[®] Oregon's Bill of Rights does not. For some reason, our draftsmen did not carry the Indiana credal preference clause into our constitution. This unexplained omission might have constitutional significance if this court had rested its October 1, 1969, opinion in any degree upon the Indiana Constitution. It did not. The court was fully aware of the language of the Oregon Constitution.

16. In discussing the constitutional principle of separation of church and state, this court was not engaged in word-matching between other constitutions and the Oregon Constitution. While neither a specific "establishment" clause nor a "credal preference" clause appears in our state constitution, it is obvious that the founders of this state did not intend to permit the state to sponsor any particular religion. When the draftsmen of the Oregon Constitution provided for the free exercise of religion, they also prohibited the use of public funds to support any preferred religious institution. Oregon Constitution, Art I, § 5.[®]

Petitioners argue, however, that the Oregon Constitution, in limiting its expression to a proscription against spending public "money" on religious insti-

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[®] Indiana Constitution, Art I, § 4:

"No preference shall be given, by law, to any creed, religious society, or mode of worship; and no man shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent."

[®] Oregon Constitution, Art I, § 5:

"No money shall be drawn from the Treasury for the benefit of any religeous (sic), or theological institution, nor shall any money be appropriated for the payment of any religeous (sic) services in either house of the Legislative Assembly.—"

tutions, by implication approved of turning over public land to them. This mechanistic interpretation of the state constitution is unwarranted. While differences between real and personal property of course have significance in a variety of legal contexts, these differences have no constitutional substance in a religious context.

We are, therefore, content to let stand our statement in the October 1 opinion, which grounded the decision on the merits in this case in part upon state as well as federal constitutional concepts. We did not intend to rely upon language which is not in our constitution. On the other hand, the language that is in the state constitution shows that the founders of this state did not intend to retreat from the federal position on separation of church and state, but rather intended to emphasize in their own words their own commitment to the doctrine of separation.

Every contention made by either side in this case has been fully examined, and a majority of this court remains convinced that the best interests of both government and religion are served by maintaining strict separation between the majority's political power and the majority's desire to foster its preferred religious faith. It is not the emblem of a religious belief which is objectionable under the state and federal constitutions; it is the enlistment of the hand of government to erect the religious emblem which offends the constitutions.

The petition for rehearing is denied.

DENECKE, J., dissenting.

I dissent upon the same ground as I dissented from the decision made after rehearing.

PERRY, C. J., joins in this dissent.

APPENDIX G

(1) AMENDED COMPLAINT FILED BY EUGENE SAND & GRAVEL:

After alleging the status of the parties and the technical facts surrounding the prior litigation, the Plaintiff alleged:

III.

"That. . . circumstances have changed materially and Plaintiff hereby alleges and denonunates the following as new matter which is so material that the decree of the Supreme Court of Oregon in affirming the decree of the Lane County Circuit Court in Case No. 76314 should be impeached, set aside, suspended and avoided.

On May 26, 1970, a charter amendment was approved by the voters of the City of Eugene, accepting at its present location, the concrete cross monument as a "memorial or monument to United States war veterans." That said charter amendment was approved by the voters of the City of Eugene by a vote of

17,185 in favor and 6,009 opposed. Said election was duly certified by the City on the 8th day of June, 1970. That attached hereto, marked Exhibit G, and made a part hereof by reference, is a true copy of said charter amendment, as adopted by the voters of the City of Eugene. That attached hereto marked Exhibit H, and made a part hereof by reference, is a true copy of the Proclamation duly recognizing the results of the election on the charter amendment. That a deed of gift to said cross was executed, delivered, accepted and recorded by the City of Eugene on the 15th day of June, 1970 in the real property records of Lane County, Oregon, on Reel 483-R as Instrument No. 9288. That a true and correct copy of said deed of gift is attached hereto, marked Exhibit I, and made a part hereof by reference.

On October 8, 1934, the City Council of the City of Eugene adopted a resolution designating Skinner Butte Park as a "memorial park for the veterans of all wars." That a true and correct copy

of said resolution is attached hereto, marked Exhibit J, and incorporated herein by reference.

That certain charter provisions of the City of Eugene relating to parks and park purposes are pertinent to the issues to be decided herein; These are Chapter I, Section 1, Subsections 8, 13, 30, 31, 51, 64 and 67 and Part 6 of the Supplemental Act, Section 176, Subsection 1. That true and correct copies of all of such charter provisions are attached hereto, marked Exhibit K, and made a part hereof by reference.

IV.

That Plaintiff is not guilty of laches, negligence or wanting in diligence on its part in presenting such new matter, said charter amendment having been passed subsequent to the decision of the Supreme Court of Oregon on December 19, 1969, and prior to the filing of this proceeding. The May 26, 1970 election results were officially stated in a promulgation by the City of Eugene received by Plaintiff June 15, 1970, and a copy of

recording of the deed of gift of the cross monument by the City on June 15, 1970."

(2) AMENDED ANSWER AND CROSS COMPLAINT OF CITY OF EUGENE:

The "City defendants" answered the Complaint by admitting all allegations and filing a cross-complaint against Petitioners.

The "new matter" relied upon in the cross-complaint was substantially identical to that in the Amended Complaint.

(3) AMENDED COMPLAINT IN INTERVENTION:

After the technical allegations American Legion Post No. 3 designated essentially the same items as new matter, adding:

IX.

* * *

"that pursuant to said Charter Amendment the plaintiff intervenor on or about the 4th day of July 1970 affixed to the base of said concrete cross a bronze plaque approximately 16 inches by 24 inches in size, with the inscription thereon as follows:

'VETERANS WAR MEMORIAL MONUMENT

DEDICATED JULY 4, 1970

In memoriam to those gallant men and women of Eugene who fought and died to keep our country free.

This plaque placed here in their honor by American Legion Eugene Post 3 and Willamette Women's Post 161'.

X.

"That pursuant to said Charter Amendment plaintiff intervenor and said American Legion Willamette Women's Post 161 did conduct appropriate dedication ceremonies of said concrete cross as a war memorial as stated in the above alleged inscription on said plaque.

XI.

"That thereafter the said

war memorial has been used as the situs for memorial services for deceased veterans of wars fought by the United States of America conducted by verterans (sic) organizations with posts or chapters situated in the City of Eugene and by other associations honoring those men and women killed in action in wars and armed conflicts of the United States of America.

Your plaintiff-intervenor is informed and believes, and therefore alleges, that the said war memorial will continue to be used by veterans organizations and other organizations having posts, chapters and otherwise situated in the City of Eugene and environs, as a situs for appropriate memorial ceremonies honoring the deceased veterans of all wars and armed conflicts of the United States of America.

(4) APPEARANCES BY PETITIONERS

The Petitioners demurred to all of these claims on the basis that they did not state sufficient facts to consti-

tute a cause of suit.

The demurrers were overruled, whereupon Petitioners filed answers denying that the election and the circumstances incident thereto were sufficient to constitute "new matter" so as to avoid the decree. Petitioners also filed affirmative defenses of collateral estoppel and res judicata, which were denied by Respondents in their various Replies.

Supreme Court, U. S.
FILED
JUN 20 1977
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1976

No. 76-1388

RAYMOND N. LOWE, CORRIEN R. HILL, W.A. BROOKSBY, ABE BROOKS, G. DOUGLAS STRATTON, ALFRED BLOOM, JAMES WITZIG, CLAIRE L. NEWPORT, DIRK P. TEN BRINKE, AND E. JEAN WARE, Petitioners

v.

EUGENE SAND & GRAVEL, INC., an Oregon corporation/ AMERICAN LEGION POST NO. 3, DEPARTMENT OF OREGON, an Oregon non-profit corporation, and the CITY OF EUGENE, OF LANE COUNTY, OREGON, a municipal corporation, et al., Respondents.

****

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

****

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Of Counsel for Petitioners

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1976

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RAYMOND N. LOWE, et al.,

Petitioners,

v.

EUGENE SAND & GRAVEL, INC.,
an Oregon corporation, et al.,

Respondents.

****

REPLY TO PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF OREGON

****

The Oregon Supreme Court decided all issues regarding alleged violations of the Oregon Constitution. Therefore, the only remaining issue is if the charter amendment permitting the cross to stand in Skinner's Butte Park in Eugene, Oregon has violated the U. S. Constitution.

In determining whether the governmental act in question is unconstitutional, the only

accepted tests are the purpose and effect, and excessive governmental entanglement tests. This was pointed out in the opinion of the Oregon Supreme Court on page 74 of the Petition as follows:

> "Many laws which are held to be valid despite claims of unconstitutionality for violations of separation of church and state may initially have been sponsored by a "majority" and opposed by a "minority." The only proper basis for deciding the validity of such laws, however, is whether they satisfy the three-fold test of "purpose," "primary effect" and "entanglement." If they satisfy such a test, the fact that a "majority has imposed its views" on such a minority is, of itself, immaterial."

In reviewing the facts, evidence and exhibits submitted at trial, the Oregon Supreme Court then held:

> "...that under the "changed circumstances" in this case the present display of the cross, although admittedly a "religious symbol," is not unconstitutional because the present purpose of the display is

> secular; any "effect" to "advance" or "inhibit" religion is not "primary," but is no more than "remote and incidental," and, under the restrictions imposed by the charter amendment, there is no "excessive entanglement" by the City of Eugene." (Petition for Writ of Certiorari, page 84).

Further, the suit in question was brought pursuant to Oregon statute, ORS 16.460(1), which provides that a former decree may be set aside if a change in circumstances is proved. (See footnote 3, page 69 of Petition for Writ of Certiorari). The Oregon Court was satisfied that the evidence submitted at the trial showed a sufficient change in circumstances to justify setting aside the former decree. Therefore, the issue proposed by Petitioners, that the result of this case may or may not be avoided by plebiscite, has been decided by Oregon law and fails to raise a federal question.

It is the Respondents position in this case that the case law in cases of this nature

is so clear and decisive that Petitioners fail to justify review by this court under rule 19 of the rules for the Supreme Court of the United States. Therefore, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

JAQUA & WHEATLEY, P.C.

By_____
William G. Wheatley, Of Attorneys for Respondent Eugene Sand & Gravel, Inc.

DUDLEY C. WALTON

_____
Attorney for Respondent American Legion Post #3

LARRY R. ROLOFF

_____
Attorney for Respondent Amicus Curiae